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AIRLINE MERGERS, MONOPOLY, AND THE CAB

By Richard J. Barber†

In 1961 the eleven American trunk airlines reported an aggregate loss of $34.8 million.[1] This elementary, but important fact (coming on the heels of a modest $68,000 profit in 1960) sums up the various depressing forces that have been at work in the industry within recent years. The introduction of the jets, beginning in 1959, meant a substantial increase in capacity as well as large capital outlays. Total industry debt rose to more than $1.3 billion, and interest payments alone climbed to $59 million in 1961 (up from $16 million in 1957). Passenger traffic, however, did not increase sufficiently either to fill the additional seats which had been made available or, even at higher fares, to offset the resulting increase in expenses. In 1960 revenue passenger miles carried by the trunk airlines grew by only 3.9%, in 1961 by 1.1%. By contrast, during these two years available seat miles increased by nearly 14%. As a result the passenger load factor was reduced to 56.2%. And, further, more passengers made use of coach-class service, some 57.8% of all passenger miles flown in 1961.

Between 1958 and 1961 total operating revenues of the trunk airlines increased by about a third (from $1.5 billion to $2 billion), but operating expenses advanced by about 44% (from $1.4 billion to a little over $2 billion). Earnings fell sharply in 1960 and went into the red in 1961. Naturally the rate of return on investments has fallen steeply, reaching 1.3% in 1961 (as defined by the Civil Aeronautics Board [CAB])[2]—far below the level officially considered reasonable and adequate (a year ago it was determined that for the trunk airlines a fair return on investment is 10.5%).[3]

Whether the economic situation of the industry is as bleak as some spokesmen suggest, however, and whether it is any more than a temporary condition that will be alleviated in large measure by improved circumstances beginning this year, are vital issues that have not been adequately appraised so far in the search for a remedy to what has simply been assumed to be a basic malady. At any rate, the agents of the larger airlines and the Chairman of the CAB, among others, have portrayed the plight of the industry in El Greco hues: all is dire, and something must be done soon if the industry is not either to flounder into bankruptcy or to require Federal subsidy again. Of what this action should consist, though, is not clear. A few advocates, such as the President of Continental Air Lines, feel that the proper step at this time is lower fares, an economy

† Assistant Professor of Law, Southern Methodist University.

[1] Air Transport Association of America, Facts and Figures About Air Transportation, 16-17, 28 (23rd ed. 1962) [hereafter 1962 ATA Facts & Figures]. The other data contained in the opening paragraphs are also taken from this source. A more complete examination of the financial situation is contained in part I *infra*.

[2] Net income before interest and after taxes as a percentage of net worth and long-term debt.

[3] General Passenger Fare Investigation, 1A Av. L. Rep. ¶ 21,236 (1961).

rate up to 25% below prevailing coach tariffs. The industry rather generally repudiates this approach to the problem (Continental at first withdrew its fare proposal, largely in response to the cold reaction it received from the CAB);[4] most of the carriers, in fact, believe that higher fares are in order, designed so as to raise coach rates from 75% to 83-85% of first class rates as well as to boost the overall fare level.[5] Their reaction thus is to boost fares and, apparently assuming little or no demand price elasticity,[6] increase revenue enough to once more generate fair profits.

At root, however, the larger airline officials and their government counterparts feel that mergers provide the only real answer to the industry's needs (needs, I repeat, which are pictured as critical and otherwise incapable of satisfaction). In this quest they have received particular encouragement from Chairman Alan Boyd of the CAB. Speaking at Hartford last November, he expressed the "hope that others of the eleven domestic trunk lines now in existence will merge in the future. . . . Time may be running out for some carriers to receive what they and their investors consider to be a fair price for merging into other companies. It is altogether possible that financial conditions in the industry may become worse before they become better than they are now. Time is of the essence here, and there is little or none to waste."[7] The same theme has run through several of his other addresses; in 1960 he said "it is entirely possible that a series of mergers or consolidations might be beneficial to the trunk-line industry and in the public interest."[8] Again, in June of this year Chairman Boyd, perhaps with more reserve, stated that "in some situations it does appear that mergers may be accomplished that will save a great deal of expense and still provide the traveling public with a good transport system."[9] One reporter concluded that these statements amount to an authoritative "carte blanche for airlines interested in merging."[10]

[4] New York Times, Oct. 31, 1961, p. 61, col. 5.

[5] For a review of the various airline positions, see New York Times, Nov. 16, 1961, p. 78, col. 4. Virtually all favor a general increase in fares, beyond the prevailing level (which incorporates a 3% increase placed in effect on February 1, 1962). Braniff and American are particularly strong advocates of narrowing the first-class coach differential. Eastern is in an anomalous position; although it criticized the Continental economy fare plan and generally favors higher fares, it has aggressively expanded its air-shuttle and air-bus services—both involving fares below coach levels. The CAB suspended the Continental economy rate, pending further study; then the airline withdrew its proposal. New York Times, Jan. 30, 1962, p. 46, col. 7. It resubmitted a similar plan later in 1962.

[6] "Demand price elasticity" refers simply to the relative effect of a change in price on the quantity of the goods or service demanded. If price is raised 10% and demand falls by 10%, the elasticity is said to be -1. If demand does not change, elasticity is zero—a very uncommon situation. See generally Stigler, Theory of Price, ch. 3-4 (rev. ed. 1952).

[7] New York Times, Nov. 4, 1961, p. 46, col. 1. History suggests that whenever the industry gets into financial difficulty the Board dashes forth with a bottle of merger medicine. In 1949 and 1950, just after a period of airline deficits, the CAB began a study looking to "the possibility, feasibility, and desirability of bringing about a merger of air carriers where such mergers would result in the improvement of the structure of the air transportation map of this country . . ." 1950 C.A.B. Ann. Rep. 2. See also its Statement of Policy Respecting Economic Program of 1949 for a similar expression favorable to trunkline mergers.

[8] As quoted in Public Utilities Fortnightly, Sept. 14, 1961, p. 487.

[9] New York Times, June 12, 1962, p. 51, col. 1.

[10] New York Times, Feb. 4, 1962, § 10, p. 1, col. 6-8. On Sept. 28, 1961, Mr. Boyd met with the presidents of all the trunk carriers to discuss the economic situation and to compare their fare and rate "philosophy." It is believed that the Chairman may also have outlined his attitude to mergers; indeed, much of the trade discussion relative to this matter has been noted since the date of this meeting. Aviation Week, Sept. 18, 1961, pp. 38-39.

Whether that is true remains to be seen—and we shouldn't have too long to wait.

Prodded by the CAB and inspired by the businessman's inherent desire to reduce the vigor of the competitive struggle, several major airlines are actively engaged in the merger movement. Excepting the United-Capital merger approved in 1961 (which, because of Capital's bankrupt condition, places it in a distinct category), the most important of the mergers in process involves American and Eastern Air Lines, the second and fourth largest domestic carriers (together accounting for about a third of truck revenue passenger miles in 1961). Approval of their merger has already been formally sought from the CAB, and hearings have recently been concluded.[11] On June 19 the CAB authorized the Hughes Tool Company, which has legal title to 78% of TWA's stock, to acquire 56% of Northeast's common stock from the Atlas Corporation;[12] this brings a merger of these two lines one long step closer to realization, though it should be noted they are presently in close liaison since Northeast is using jet equipment leased from TWA for which it is not meeting current rental payments. And waiting in the wings, so to speak, are a number of other prospective consolidations. Precisely who will be involved in what marriage remains a subject for trade speculation. But the possibilities include a merger of TWA with Pan American (or with others, such as Delta or Northwest); of United with Western; and, among others, Braniff with Continental. Several observers of the scene contemplate a string of mergers that will produce five or six surviving trunk lines.[13]

Clearly, then, there is a trend to mergers among the trunk airlines, one that is certain to be accentuated greatly if the American-Eastern application is approved. What is distressingly unclear, however, is the need and desirability of the various consolidations that are contemplated. Perhaps they will have private advantage, though even here a question can be raised; but to the extent they do, there is likely to be serious public detriment. Competition will be reduced (and this quality has far greater utility than many commentators acknowledge) and the imbalance that prevails within the industry—with four carriers now accounting for over 70% of passenger traffic, the remainder divided among seven other participants—is perpetuated, if not actually emphasized. No doubt consolidation can produce some benefits, but in considerable measure these appear attainable without outright merger of the carriers themselves (the amalgamation of terminal facilities is one that comes immediately to mind).

At this point in the merger movement neither the carriers themselves nor their regulators have spelled out with any acceptable degree of precision the criteria that are relevant in appraising petitions for consolidation. In his Hartford speech last November, Chairman Boyd, after urging

[11] Hearings before the examiner finished on June 19. Post-hearing briefs were due on July 24 and rebuttal briefs on August 2. A decision is expected in the fall. New York Times, June 21, 1962, p. 48, col. 3.

[12] New York Times, June 20, 1962, p. 1, col. 2. The Board felt that the only alternative for Northeast (whose current liabilities exceed its current assets by over $11 million on Nov. 30, 1961) was bankruptcy and possible reorganization, which it deemed unacceptable.

[13] Robert Six, President of Continental Airlines, is of this opinion. New York Times, June 2, 1962, p. 34, col. 6. And the travel editor of the New York Times has outlined his plan for combining the various domestic airlines (including some of the local service operations) into about five systems. New York Times, Feb. 4, 1962, § 10, p. 1, col. 6-8; p. 19, col. 5. For a review of the trade rumors, see Newsweek, May 14, 1962, p. 88.

the airlines to consider more mergers, said "it is my personal view that if the carriers will not act soon in their own interests and in that of the public, the Board should institute studies of its own to develop detailed criteria for mergers and to determine what carriers should merge in the better interest of the industry and the nation."[14] This is a bit like urging your son to go get married in order to solve his problems, but adding that the wisdom of marriage will have to be assessed subsequently. And it is a kind of cart-before-the-horse approach that is noticeable in other recent governmental pronouncements. The Project Horizon Report (of the Task Force on National Aviation Goals) spoke of airline mergers or "appropriate route adjustments" as "the only solution" to the economic plight of certain of the trunkline carriers;[15] continuing, it declared that "mergers which result in strengthening marginal carriers, eliminating uneconomic competition, and providing new and/or improved service to the public should be encouraged." Yet after offering this vague comment, the Report *then* goes on to propose an "examination of future requirements and the creation of some standards for mergers."[16] This is absurd; it makes little sense to recommend mergers as a solution for a problem, itself inadequately analysed, without first determining whether this treatment is efficiently related to the disease and whether other approaches might not offer substantially equivalent relief with less likelihood of public detriment. Perhaps the President recognized this, for in his April 5 message on "The Transportation System of Our Nation," he admitted that "this administration has a responsibility to recommend more specific guidelines than are now available and more specific procedures for applying them."[17] Accordingly he appointed an interagency group[18] to develop such criteria and to evaluate "each pending merger in transportation," having as one objective the maintenance of "effective competition" (undefined) "among alternative forms of transportation, and where traffic volume permits, between competing firms in the same mode of transportation."[19] The ability of the group to translate these admonitions into concrete performance will be interesting to observe. At the moment, however, one is forced to the conclusion that key government officials are urging the airlines to consider merger but admitting they now lack the criteria to assess properly the merit of any given application.

While the regulators are lacking in a basis for their judgment, executives of the larger airlines, generally speaking, are confident that mergers offer the solution to their financial difficulties. While they admit that many factors are involved in their present plight, excessive competition is singled out as the real culprit. In its trial brief for the proceeding

[14] New York Times, Nov. 4, 1961, p. 46, col. 1.

[15] Federal Aviation Agency, *Report of the Task Force on National Aviation Goals: Project Horizon* 180 (Sept. 1961). The Chairman of the eight-man Task Force was formerly an official for two of the trunk airlines; the Vice-Chairman had been vice-president of the Air Transport Association of America; one of the other members was previously assistant general counsel for the Air Transport Association.

[16] *Id.* at 181.

[17] Message from the President of the United States, The Transportation System of Our Nation, H.R. Doc. No. 384, 87th Cong., 2d Sess. 8 (April 5, 1962).

[18] A five-member committee has been appointed. It consists of the Secretary of Commerce for Transportation (Chairman), a member of the Council of Economic Advisers, an Assistant Secretary of Labor, the Assistant Attorney General for Antitrust, and the chief of the Justice Department's public counsel section. New York Times, May 16, 1962, p. 53, col. 6.

[19] *Supra* note 17, at p. 8.

American Airlines says flatly "that the increased level of competition and the consequent inevitable provision of excess capacity is chiefly responsible for the industry's present state is clear."[20] Since 1955 the CAB has increased the degree of competition on most routes which formerly had provided the major carriers with cream for their operations. The effect has been to expose great chunks of the Big Four's previously monopolistic preserves to the competitive inroads of the smaller trunk operators. As American interprets it this increased competition is the principal cause of its (and the industry's) weakening position. Thus there is only one proper response: permit mergers to reduce this competition. Of course, it sees in merger other gains; facilities can be combined, flight equipment more efficiently utilized, and capital requirements significantly reduced. Consolidation hence will reduce competition and permit more effective and fuller exploitation of expensive equipment, with a consequent reduction in unit costs. In a nutshell, that is the heart of its argument. If true, the case for mergers is an impressive one.

Closer analysis, however, supports the belief that contemplated trunk airline mergers, specifically that between American and Eastern, are undesirable, unnecessary to the realization of operating economies, and poorly related to the industry's recent financial troubles. This is not to say that mergers, by curtailing competition, might not offer some indirect economic aid to the surviving airlines. What it suggests is that the price paid by the public, through the consequent reduction in competition and overall increase in concentration, is far too high.

Regardless of the conclusions reached, one fact, nevertheless, stands out: mergers cannot be intelligently appraised without a full appreciation of the relevant financial characteristics (the subject of part I), the structure of the airline industry, and the CAB's post-1955 efforts to increase the degree of competition over many routes and to achieve a lower level of concentration (part II). Only when these facts are digested can one sensibly evaluate the nature and implications of a specific merger—such as American-Eastern (part III). While the general conclusion of this article is that the case for airline mergers is unproven, part IV indicates that this is not a time for complacency on the part either of the airlines themselves or the CAB. Although carrier profits should turn up this year, if this does not happen and if more aggressive fare manipulation does not improve the situation, more drastic action may be required. Yet even if this requires some curtailment in competition (a point open to dispute), mergers do not appear to be the best way of achieving this goal.

I. Economic Characteristics of the Trunk Airline Industry

As put forth by the proponents the case for airline mergers emanates from two principal hypotheses: *first*, that the trunk airline industry is in serious financial condition and cannot survive, absent basic structural reorganization or outside assistance; *second*, that mergers provide the best

[20] Trial Brief for American Airlines, In the Matter of the Application of American Airlines and Eastern Air Lines for Approval of Merger, CAB Docket No. 13355, p. 11. This theme runs through a number of exhibits which it presented. In particular, see exhibits AE-F, AE-151/155, 166-67. [All subsequent references to exhibits are to this same proceeding.] The parallel line of argument advanced by Eastern Air Lines is spelled out in its Merger Proxy Statement, March 12, 1962, *passim*.

solution to the industry's difficulties. This section deals primarily with the first of these two main arguments.

Viewed in broad financial terms the recent performance of the trunk airline industry has been highly disappointing. This was particularly true in 1961, though 1960 was not a great deal better. The surface indicia of this distress are easily recounted. While passenger capacity rose (on an available seat mile basis) by 7.4% in 1960 and by 6.9% in 1961,[21] reflecting the high-rate of jet delivery and introduction into service (there are now about 300 four-engine jets in domestic use),[22] passenger traffic increased only modestly. The number of revenue passenger miles flown in 1960 increased by 3.9% and in 1961 by only 1.1%. With increasingly more passenbers flying by coach (in 1961 some 57.8% of all traffic carried), offsetting somewhat the higher fares which had been placed in effect, total operating revenue rose by only about 5% in 1961. Operating expenses increased somewhat more, and, in conjunction with nonoperating charges (notably interest on long term debt), total costs for the first time since 1947 ran ahead of revenues. The result: a net loss for the eleven carriers of $34.8 million, down from the small $68,000 profit recorded in 1960.[23] The return on investment (as that is defined by the CAB and the airlines)[24] declined from 2.8% in 1960 to 1.3% in 1961, far below what the Board determined in 1961 to be a reasonable return—namely, 10.5% for the trunk airlines as a group (10.25% for the Big Four, 11.125% for the rest.)[25] So described the situation is indeed dire.

But a look under the industry blanket reveals certain facts that somewhat brighten the scene. For one thing, about half of the 1961 deficit was accounted for by TWA, and most of its losses in turn were incurred through its international rather than its domestic operations.[26] Another $9.5 million of the overall 1961 loss was reported by Northeast Airlines, which has been on the verge of bankruptcy for so long that its 1961 experience reflects no change in events. The fate of National Airlines, which for the fiscal year ending June 30, 1961, as a whole lost $7.3 million, demonstrates further that the industry's losses were heavily concentrated in the first half of the year (roughly coinciding with the return of economic recovery).[27] As well, if the performance of these three airlines, along with Eastern's, is separated from the whole one finds that the other seven had a combined net profit of $23 million.

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[21] 1962 ATA Facts and Figures 17.

[22] 1962 ATA Facts and Figures 34. The number has increased rapidly, though it has slackened this year—for reasons that will be brought out later in the text. On Jan. 1, 1960, there were 84 four-engine jets in operation; by Jan. 1, 1961, the number had increased to 202. Forecasts called for a further increase to 301 by Jan. 1, 1962, and to 385 by 1963. Thereafter increases will be small—400 by the beginning of 1964. Federal Aviation Agency, Aviation Forecasts: Fiscal Years 1962-1967, table 3 (Oct. 1961). [There is some slight disparity as to the number of jets in service on Jan. 1, 1961, between the preceding source and Federal Aviation Agency, Statistical Handbook of Aviation 38 (1961 ed.).]

[23] For a more detailed breakdown of individual revenue and expense items, see 1962 ATA Facts and Figures 24-28.

[24] See *supra* note 2.

[25] See *supra* note 3.

[26] Braniff Airways, which operates flights to South America, is not unlike TWA in this respect. In 1961 Braniff recorded a profit of 67¢ a share on its domestic operations but lost 24¢ a share on its international service. Standard and Poor's Current Air Transport Survey, March 15, 1962, p. A27.

[27] National's new president and controlling stockholder estimates that for the current fiscal year the airline's operating revenues will be up by as much as a third compared with a year ago, and that pre-tax earnings will be $2 a share. New York Times, June 21, 1962, p. 41, col. 2-3.

Moreover, any accurate assessment of the situation requires allowance for differences in the composition of the respective trunk airline capital structures. While the industry generally has added significantly to its debt since the arrival of the jet (debt made up about 29% of aggregate trunk airline capitalization in 1955; by 1961, excluding Northeast Airlines, it had increased to 66%),[28] this has been considerably more true of some of the airlines than of others. This story is told well by their widely varying debt equity ratios: American's is 2:1, Eastern's 1.95:1, TWA's a whopping 3.25:1, and for the smaller airlines much lower—1.3:1 for Continental and Delta, 1.1:1 for Braniff.[29] As a result their relative profitability—net profits as a percentage of net worth—takes on a distinctive hue. And even on an overall basis, if the net worth measure is employed, their earnings look much better than may otherwise appear. The reason is that the industry typically announces its rate of return on an investment base that consists of both equity *and* long-term debt. This in itself tends to over-emphasize the recent earnings downturn. In 1961, a lean year, several of the airlines made respectable returns on their common stock equity—Delta 11%, Northwest 8.5%, American 5%.

What customary industry financial reports hide, in particular, is the growing importance of interest and depreciation charges. These reflect the large additions of debt and purchases of jet equipment that have been made since 1955. Interest charges have skyrocketed over this period, rising from $6.9 million in 1955 to $58.6 million in 1961 (an increase of 850%, the largest of any single expense item). Also, as the jet equipment has been acquired, depreciation charges have mounted rapidly—up from $102 million in 1955 to $252 million in 1961. The relative magnitude of these cost increases is seen in this table:

TABLE 1. INCREASES IN TRUNK AIRLINE EXPENSES, 1955-1961

Expense Category	*1955*	*1961*	*Percentage Increase*
	(in millions)		
Total operating expenses	$1,010	$2,020	100%
depreciation	102	252	150
general services and admin.	409	794	94
maintenance	196	400	104
flying operations	303	574	90
Interest on long term debt	7	59	850

Source: *1962 ATA Facts and Figures*, pp. 26, 28.

[28] Exhibit AE-D, appendix 18.

[29] Calculated from data in Aviation Week, May 14, 1962, p. 53. There is more than mere financial significance in the heavy debt loads assumed by the larger airlines. With a small group of banks and insurance companies having advanced most of the funds, the control they assume over contemplated mergers presents a dangerous situation. This is particularly true when the airlines and these financial groups tend indirectly to interlock through their boards of directors. When high airline officials of American, for example, sit alongside the spokesmen for Eastern on boards of directors of the financial institutions (e.g., Chase Manhattan Bank) which have advanced both airlines large sums of money and which must approve any merger, one has a right to be suspicious of the motives and circumstances leading to the decision to merge these two giant air carriers. This matter has been examined more completely elsewhere. See, A Staff Report to Subcommittee No. 5 of the House Judiciary Committee, Proposed Merger of Eastern Air Lines and American Airlines, 87th Cong., 2d Sess. 24-33 (1962). For a more colorful account see Transport Workers Union of America, The Big Grab 3-9 (1962).

While depreciation is treated as an expense just like payments for jet fuel or wages, and has been rising much more rapidly than other cost components, it does not involve an actual cash withdrawal; rather it tends to depress earnings in a misleading fashion in the more recent years. Further, inconsistencies in depreciation rates greatly distort actual financial performance. As an illustration, in 1961 American and Eastern claimed about the same amount of depreciation, $38 million. But Eastern is depreciating its jet equipment on the basis of an estimated useful life of 10 years and a residual value of 10%, while American is using 12 years and 15%.[30] On a hypothetical cost of $100 this means that American is taking $7.08 per year in depreciation (on a straight-line basis) as compared with $9 in the case of Eastern. The effect is to depress Eastern's net earnings (or accentuate American's, if you prefer) and contributes heavily to the book losses it has claimed during the last two years. Indeed, according to one source, if certain changes in accounting practices which Eastern has adopted recently had been in effect during the period 1954-1956, its net earnings would have been in excess of $50 million instead of the reported $35 million.[31]

The pronounced increase in depreciation taken by the trunk airlines in the past three years means that corporate cash flow has been soaring enormously. As of September 30, 1961, their total retained earnings came to $308 million, with aggregate depreciation adding about $1.2 billion.[32] The scale of these amounts can be gauged by comparing cash flow per share with earnings per common share for the year 1961.

TABLE 2. TRUNK AIRLINE CASH FLOW AND EARNINGS, 1961
(per common share)

Carrier	*Earnings*	*Cash Flow*
American	$0.85	$5.19
Braniff	0.43	3.05
Continental	0.40	3.80
Delta*	4.15	12.91
Eastern	(2.97)	13.60
National*	(3.92)	1.17
Northeast	(5.00)	(2.81)
Northwest	2.10	14.98
TWA†	(2.21)	6.49
United	0.70	12.85
Western	0.60	7.02

* Fiscal year ended June 30, 1961.
† Excludes special write-off.

Source: *Forbes*, May 1, 1962, p. 23

The growth of the companies' cash flow has many important implications.[33] It tends to reduce the practical significance of net earnings as an

[30] Eastern Proxy Statement, March 12, 1962, pp. 36, 43. For tax purposes depreciation is calculated at a faster rate.
[31] Exhibit DL 30, p. 17 (presented by Delta Airlines).
[32] 1962 ATA Facts and Figures 30.
[33] Of course, the great increase in cash flow has had general applicability (though typically it has been a good bit less pronounced than in the case of the trunk airlines). Corporate profits have not quite doubled over the last 15 years; but the total of retained earnings and depreciation

index to financial well-being. Corporations can literally live off their cash flow. At the end of 1966, for example, Eastern Air Lines could have working capital of over $83 million—*after* paying cash of some $200 million for 40 Boeing 727's that it has on order.[34] Even though this assumes that Eastern will make full use of its presently-indicated borrowing power, this still represents a sharp increase in its working capital, which amounted to $18.6 million at the end of 1961. The explanation for this magical feat lies principally in the swelling depreciation charges it will be claiming throughout the period. Simlarly, internally-generated cash will pay for Braniff's fourth Boeing 720 and for six BAC-111 short range jet transports to be delivered in 1964 and 1965.[35] Again the reason lies in depreciation charges; in 1963 these alone will amount to $8.5 million, or $3.75 million more than anticipated debt and interest payments.

With the trunk airlines having such substantial cash flow it is misleading to confine one's attention simply to the carriers' net earnings. This hides from view the very qualities that most financial students consider to be most important in assessing a firm's financial health. Actually the airlines, as well as most corporations, are a good deal better off than their profit claims indicate. This does not necessarily mean that airline earnings are now adequate, but it does suggest that their malady is not nearly so serious as at first appears.

If the airlines' 1960 and 1961 financial showing is indicative of future performance, however, there is nevertheless some cause for concern. But analysis of the situation suggests that the past two years were atypical and do not provide a useful guide to the future. There are many reasons for this conclusion. For one thing, the past five years have contained two sharp recessions, each roughly a year long. Both were severe and reflected a sizeable drop in the level of business activity. From 1957 to 1958 the Industrial Production Index fell by 7%; from January, 1960, to February, 1961, the Index fell by over 8%.[36] Since the airlines depend on business travel for the bulk of their revenue, it is only reasonable to suspect a correlation between the movements of the economic cycle and airline traffic. And increasingly this hypothesized relationship seems to be confirmed. Although during the two earliest postwar recessions, 1948-1949 and 1953-1954, traffic continued to increase substantially, this has not been true more recently. In 1958 revenue passenger miles did not increase at all over 1957 (when there had been a 13.6% increase). In 1959, with cyclical recovery, traffic rose sharply, by over 15%; but then with the return of recession in 1960 the rate of growth fell once more, so the passenger traffic rose by only 3.9%—and by only 1.1% in 1961 (a year only partially marked by an upswing).[37] Like most everyone else in the United States the airline industry has clearly been the victim of a low rate of economic growth and of increasingly shorter periods of

("cash flow") has more than doubled. Depreciation allowances now are equal to about 80% of plant and equipment expenditures compared with 33% in the late 1940's. Bookman, *The New Anatomy of Business Profits*, Fortune, May 1962, p. 107, 108-09.

[34] Exhibit DL 37B.

[35] Aviation Week, April 2, 1962, p. 35.

[36] Economic Report of the President, January 1962, table B-32; Jan. 1960, table D-29.

[37] 1962 ATA Facts and Figures 17.

recovery.[38] Its fortunes cannot be separated from the movements of the economy as a whole any more than those of the steel industry. When the economy is anemic, so too will be airline earnings.

But the failure of airline passenger traffic to grow more rapidly than it has since 1959 is attributable to more than economic recession. Fares have gone up sharply during the last four years, by about 25% (depending on the exact measure used) from 1958 through and including the 3% increase approved by the CAB this year. This is a point which the Air Transport Association, the certificated airlines' trade association, zealously attempts to disguise. But the fact remains that average revenue per passenger mile collected by the domestic scheduled airlines has increased by over 21% since 1958 as compared with a rise of only 3.4% in the Consumer Price Index.[39] Not unexpectedly this has meant increasingly more intensive use of coach class service and, it would also seem, a decline in the rate of traffic growth. Certainly it would be a terribly unusual market if demand were not to respond negatively to such steep price increases (airline spokesmen have a propensity for assuming, usually, that demand elasticity is zero; this is absurd, of course). The way in which airline fares have increased can best be illustrated as in the following table:

TABLE 3. ILLUSTRATIVE FARE INCREASES, 1954-1962
(one-way fares, tax excluded)

	New York-Los Angeles		*New York-Chicago*	
	First Cl.	*Coach*	*First Cl.*	*Coach*
July 1954	$158.85	$ 99.00	$45.10	$33.00
July 1957	158.85	99.00	45.10	33.00
July 1958	166.25	104.00	47.95	35.35
July 1959	166.25	104.00	47.95	35.35
Add for Jet	10.00	10.00	3.00	3.00
July 1960	171.45	109.15	50.15	38.30
Add for Jet	10.00	10.00	3.00	3.00
July 1961	171.45	109.15	50.15	38.30
Add for Jet	10.00	10.00	3.00	3.00
June 1962	176.60	112.45	51.70	39.45
Add for Jet	10.30	32.65	3.05	3.25

Source: *Official Airline Guide*

[38] Since many people consider the discussion of growth rates academic, it is well to note the close connection between rapid growth and high airline profits. From 1949 to 1955, a favorable period for the airlines, the economy (gross national product in constant 1954 dollars) expanded at an average annual rate of 5%. But from 1955 to 1959 the pace slowed to only 2% (and airline earnings, along with corporate profits generally, fell heavily). In 1959 the rate increased to 7%, and the trunk airlines earned nearly $62 million. But then the rate of advance slowed again, to 2.9% (1960 compared with 1959) and then to 1.8% (1961 over 1960). Airline profits tumbled too. With the upswing now in progress earnings once more are advancing. Report of the Joint Economic Committee of Congress, Employment, Growth, and Price Levels, table 5, 86th Cong., 2d Sess. (1960); Economic Report of the President, January 1962, table B-3.

[39] Commenting on fares the ATA says, in carefully chosen public-relations type language, "the fare for travel on the U.S. scheduled airline system continues to be an outstanding bargain. The average 1961 air fare in the United States was 11.9% over the 1951 fare and just one penny per passenger mile over the average 1938 fare. While air fares increased just 18.8% on the average since 1938, the price of things generally, as measured by the consumer price index, increased 111.4%." 1962 ATA Facts and Figures 10. But if 1958 is used as the base year instead of 1938, then the average revenue per passenger mile has climbed from 5.64¢ to 6.28¢, up 21% compared with 3.4% in the consumer price index. Moreover, coach fares, from 1951 to 1961, have risen more than twice as fast as first class fares when figured on an average revenue per passenger mile basis. *Ibid.* This is even more true of short hauls than of longer hauls. See New York Times, March 11, 1962, § 10, p. 5, col. 3-4 (letter from an ATA vice-president).

Actually this table tends to understate the extent of fare increases; for example, in 1959, the major airlines operated a significant amount of propeller service between the points indicated, so that there was a real choice between jet and prop flights. This is no longer true; between New York and Los Angeles and New York and Chicago the principal carrier, American Airlines, offers nothing but jet service. The result is that the traveler who could go from New York to Los Angeles via coach prop equipment in 1959 for $104 now must pay $145.10.[40]

With such steep fare increases it is not surprising that the airline passenger market has failed either to grow significantly in recent years or to reach a broader segment of the populace. Recent surveys indicate that roughly 80% of the American people have never traveled by commercial plane. And actually the airline passenger market is a good deal more limited than even this would indicate. A survey conducted by *Fortune* magazine showed that the 59% of passengers interviewed who were traveling on business accounted for 87% of the trips taken by all passengers. Moreover, "heavy business travelers" (those who took more than 31 air trips over a nine-month period) accounted for 80% of the trips.[41] What this means obviously is that the airlines are concentrating the bulk of their attention on a very small segment of the potential market. Since business travelers are likely to be less responsive to fare increases (virtually all of this kind of expenditure is tax deductible, with a significant amount of it no doubt fully paid for by the taxpayers since it is chargeable to government contracts), it is probable that this is the only reason why the airlines have not sustained an actual decline in traffic growth over the past three years. Indeed the fact that traffic has continued to expand, though only slightly, in the face of the recent fare increases, actually appears to have kept the carriers themselves from recognizing that the market for airline travel is excessively constricted. At the core of the airlines' problem lies a lack of passenger traffic;[42] certainly this will not be cured with continuing fare increases. Yet only Continental Air Lines has been "daring" enough to propose a sharp price cut—in the form of an economy service at 25% below coach rates. The rest of the industry believes in higher fares and in a narrower gap between coach and first class tariffs. This seems to be the ideal way to curtail traffic growth and to prevent enlargement of the market. Again, one wonders whether mergers are the answer to the industry's troubles, or whether the solution in fact doesn't lie within its own domain.

There are still other reasons why much of the blame for the trunk industry's recent performance can be laid at its own door. One of the superficial causes of the carriers' current difficulty is found in their extensive jet equipment acquisitions. Not only did this greatly increase available capacity, but it meant a sharp rise in debt and in related interest and depreciation charges. When orders for the four-engine jet equipment were

[40] The 5% round trip discount, in effect until 1959, has also been eliminated.

[41] Fortune Airlines Study, p. 4. A similar study, conducted on behalf of American Airlines by the Opinion Research Corporation, showed that 78% of the American people have never flown on a commercial airline and that the 15% of air travelers who take five or more trips a year account for 64% of total air trips. Aviation Week, Feb. 26, 1962, p. 47. On the passenger travel market, generally, see Cherington, Airline Price Policy 30-41 (1958).

[42] If the passenger load factor had been just one point higher in 1961 than it was (57.2% instead of 56.2%), gross revenues would have increased by about $32 million.

being placed in 1956 (deliveries began in 1959) one business analyst concluded that the purchases were unjustified by predicted passenger traffic increases. In fact, concluded this writer, if traffic were to grow as was predicted and if all then-existing passenger equipment were kept in use and if the jet equipment were operated as many hours as the old equipment with seating space divided equally between first and coach class, the 1961 load factor would have been 38%.[43] As it turned out the actual load factor was 56.2%, reflecting, not a rise in traffic (indeed the 1956 traffic projections were highly accurate), but the earlier retirement from passenger service of piston equipment, slower than anticipated jet deliveries, and less intensive utilization of the new planes. The major trunk lines, American in particular, jumped into the jet market with near-reckless abandon (the President of American Airlines, C. R. Smith, appears now to recognize this).[44] The smaller carriers were more cautious, and Continental, for one, believes that if more efficiently used, American could operate with ten fewer 707's and 720's than it had in 1961 (as of March 5, 1962, American owned 48 planes of these types).[45] Whether this be true or not, it is clear that in purchasing the larger and far more expensive jet equipment the airlines took a considerably more optimistic view of the market than was warranted. (It is rather interesting now to note the gloomy outlook foreseen by American and Eastern executives; they appear to oscillate between all-out optimism when new jet equipment is ordered and full-scale pessimism when mergers are being pressed.)

In addition, the new equipment has been used to provide as frequent service as was the case when piston planes were in use, despite their capacity differences (in terms of size and speed). The carriers argue that ticket sales correlate to the number of flights offered and not to the capacity of the aircraft. Result: proportionately more flights are now offered with the larger, faster jet planes than with the older, smaller, slower piston planes. Given only a modestly expanding demand the effect obviously is a declining load factor.

There are a number of other factors that make the 1960-1961 performance a poor basis for predicting future airline industry financial results. Strikes in both years seriously affected several of the trunk carriers, taking a particularly heavy toll in the case of Eastern and TWA. The large-scale work stoppage in February, 1961, resulted in an overall revenue loss for the industry of $12 million, equal to about a third of the aggregate deficit for the entire year. Accompanying these revenue curtailments have been certain special expenditures. The most serious of these stemmed from the necessity of modifying the Electra; this took several months and in the interim the plane had to be operated at suboptimal speed, with the effect of sharply increased operating costs (up from 168.7¢ per mile in the first quarter of 1960 to 191.7¢ in the second quarter). Eastern Airlines, whch had 39 Electras in service, was especially hard hit; in fact all of its planes were not back in service until mid-Summer 1961. The Electra difficulties, of course, also affected the revenue side of the picture, creating what the airlines insist was anti-flying sentiment among

[43] Saunders, *The Airlines' Flight from Reality*, Fortune, Feb. 1956, p. 91. Said this writer: "Bluntly, there is no visible prospect of any such rapid increase in airline passenger traffic." *Id.* at 222.

[44] As reported in Forbes, May 1, 1962, p. 23.

[45] Exhibit CAL-R15.

many passengers. (Like so many airline claims this one lacks any acceptable degree of specificity; but no doubt it contains some truth.)

While the trunk airlines' financial problems in the last few years are less serious than may appear at first reading, admittedly there are some legitimate bases for concern; even so, so many factors have been at work during 1960 and 1961 that it is difficult to pinpoint the causes of their troubles. Some have been uncontrollable and unpredictable (labor disputes, accidents, equipment problems); others have been related to general economic circumstances; some appear to lie largely within their own control (rate increases that have chilled market development). A paramount question remains, however. Will the near-future be any more favorable to the airlines and can earnings reasonably be expected to increase in the years immediately ahead?

There are several reasons for believing that airline profits can be expected to turn up in the very near future. Jet operating costs have begun to decline, offering clear promise that they will be the most efficient operating flight equipment in airline history. In 1961 the total direct costs (including depreciation) of operating the Boeing 707 averaged 176.99¢ per revenue mile and for the Douglas DC-8 181.55¢ per revenue mile;[46] both cost levels were down from the prior year, bearing out the industry view that it takes a period of experience before new equipment can be operated most economically (in fact the DC-8 figure noted above represents a decline from 201.90¢ a year earlier, shortly after this type of equipment had been introduced into service). The great economy of the jet can most readily be appreciated by comparing it with, say, the Electra; the latter's 1961 per revenue mile cost was 160.91¢, or a little less than the pure jets. But the Electra has only 66 seats compared with 107 for the Boeing 707 and 117 for the Douglas DC-8 (these being American Airline seating configurations). The jet's seat mile costs are thus much lower, and promise to decline still more, making it extremely probable that the 1961 industry breakeven load factor of 56.5% will fall noticeably in 1962. There are, in addition, other kinds of costs related to the introduction of the jet that are now out of the way—introductory costs of flight simulator devices, repair equipment, etc. From now on the full advantage of the jets can seemingly be exploited.

Moreover, 1962 represents a hiatus in jet equipment deliveries, promising therefore not only a decline in the rate of increase in capacity but also a gradual slowing in added depreciation charges. As of June 20, 1961, some 94 Boeing 707's (the first four-engine jet in service) had been delivered, with 16 more on order for delivery in fiscal 1962 (several of these were actually delivered in calendar 1961) and fiscal 1963; the major airlines (with the exception of TWA) tend to have completed their 707 acquisitions. (American is in this category for example, presently awaiting some Convair 990's and the short and medium-ranged 727, scheduled for fiscal 1964.)[47] Likewise with the Boeing 720: fifty of these were in service on June 30, 1961, another 42 were on order for delivery in fiscal 1962, and only three are on order for later delivery.[48] Few of the Douglas DC-8's, although somewhat longer coming into production, remain to

[46] Aviation Week, March 13, 1961, p. 147; April 30, 1962, p. 55.
[47] Eastern Proxy Statement, March 12, 1962, p. 22.
[48] Federal Aviation Agency, Aviation Forecasts: Fiscal Years 1962-1967, table 2 (October 1961).

be delivered. While some other models still are being currently put in use (e.g., the Convair 990), the great bulk of jet equipment that has been ordered is already in service; 1962 and probably also 1963 will find few deliveries; and the next flurry of jet equipment deliveries will not come until 1964 (or thereabouts) when the three-engine Boeing 727 comes into full production. That, however, will still represent less of a burden than has been sustained during the last three years; American Airlines, for instance, has 25 Boeing 727's on order, but it already has possession of 48 four-engine jets and expects delivery of 16 Convair 990's within the next year or so; thus the 727 should pose a relatively smaller problem than has already been confronted.

The timing of jet plane deliveries and the consequent increase in capacity can be gauged from Eastern Air Line's projection of available seat miles:[49]

1961	9,384 million (actual)
1962	10,425
1963	10,637
1964	10,875
1965	12,225

Eastern, which was tardy in acquiring the jets, thus will have a sizeable increase in capacity this year. But in 1963 and 1964 capacity will increase very little (for most of the trunk airlines the schedule is similar, with the significant exception that 1961 represented their large jump in capacity with 1962 to 1964 to be years of small gains—this reflecting their earlier entry into the jet race). When the Boeing 727 comes into production and deliveries begin there will be another sharp rise in passenger capacity. It deserves emphasis, though, that that is two to three years away and at the moment the airlines are in a position where traffic can begin to catch up with available supply.

But will passenger traffic increase sufficiently to permit fully profitable use of the existing jet capacity? That, of course, is a major question. From 1953 to 1957, years of substantial airline profits, traffic grew annually at rates of anywhere from 13% to 19%. As mentioned earlier, growth in the years following was cyclical, with the traffic increases during 1960 and 1961 being mediocre. As has been suggested there are many reasons for contending that the past two years were not fairly representative of future market development, in part because of economic recession and in part because of steep fare increases. With the upward turn of the cycle there is excellent reason for believing that traffic will again increase substantially. The Federal Aviation Agency (FAA) estimates that by the fiscal year 1965 domestic scheduled airline passenger traffic will amount to 41.5 billion passenger miles (this includes local service as well as trunk carriers and is up from 30.5 billion miles for fiscal 1961). Disaggregated, the FAA forecast indicates a 1.5 billion mile increase in fiscal 1962 (up about 5%), 3.0 billion in fiscal 1963, and 3.0 in fiscal 1964.[50] This reflects a presumed slower rate of growth than was experienced before 1957 (or in the single year 1959), but is well above that established for 1958, 1960, and 1961. The CAB itself is even more optimistic, predicting

[49] Exhibit DL-R 116, p. 2.

[50] Federal Aviation Agency, Aviation Forecasts: Fiscal Years 1962-1967, table 1 (October 1961).

that by 1965 the scheduled airlines will fly about $2.5 billion revenue passenger miles, with a particularly steep traffic increase in 1962.[51]

These projections of substantial passenger traffic increases appear to be borne out by actual 1962 performance. Revenue passenger miles flown by the domestic trunklines increased by 11.5% in January, 1962, over the same month a year earlier; in February, up 28.7% (this is somewhat distorted because of a labor stoppage in February, 1961); in March, up 9.6%; in April, up 11.5%; and in May, up 11.7%.[52] Most of the airlines are forecasting substantial increases for the entire year, ranging from 6% to as high as 15%.[53] Certainly on the basis of results for the first five months of the year the future looks promising.

Officials of American Airlines, the principal proponent of mergers in the industry, however, strive to perpetuate the impression that bankruptcy (or a need for subsidy) is just around the corner. One financial source has taken note of this consciously pessimistic tone and says frankly that it is explained by their "commitment to the proposed merger."[54] Indeed, it is crucial to American and Eastern's position that they convince the appropriate parties that the industry's financial prospects are dim and that improvement cannot be expected through such forces as normal traffic increases, fare modifications, etc. If they are able to accomplish this feat it will merit an Oscar.

The case for airline mergers, as set forth by American and Eastern, is also premised on the ground that mergers will curtail unnecessary competition, improvidently brought about by the CAB since 1955, that has seriously depressed earnings to the economic detriment of the industry without consequent benefit to the public. Since this is a vital link in their position it deserves independent consideration, giving due weight to the structure of the industry and to policies of the CAB as they are reflected in route awards made since 1955.

II. The Nature and Implications of Increased Airline Competition

In the view of American Airlines, and the other principal proponents of large-scale trunk line mergers, the basic explanation for the industry's recent poor financial showing is excessive competition. Pointing to the large number of awards made since 1955 by the CAB which have increased the degree of competition, American contends that the additional industry expense annually attributable to this change in circumstance amounts to about $200 million.[55] If competition could therefore be curtailed, and American claims that the best way of accomplishing this is

[51] 1962 ATA Facts and Figures 20.

[52] Aviation Week, May 21, 1962, p. 40; Wall Street Journal, May 16, 1962, p. 9, col. 3; New York Times, June 17, 1962, § 1, p. 83, col. 2. In May the passenger load factor was 51.3%, compared with 54.6% a year earlier.

[53] Actual results tend to confirm these prognostications. During the first quarter this year American Airlines' revenues increased by 17% over the year before. Over the first four months of 1962 Braniff's traffic rose by over 12% (in terms of revenue passenger miles flown). During the first five days of June Eastern flew 15% more passengers to Miami than in the same period last year.

[54] Forbes, May 1, 1962, p. 22.

[55] Summing up its position American Airlines' witness R. E. Kimble concludes that "the increasing spread and intensity of competition among the trunklines has been the primary cause of their decline in profitability. Competition has caused a rise in costs which has exceeded the increase in fares." Exhibit AE-F, p. 17. The $200 million estimate is found in exhibit AE 166, p. 1.

via a series of mergers, profits would rise sharply and once more provide the various surviving carriers with an adequate return on their investment. So goes the argument.

Bolstering the case for mergers is the position of certain commentators that competition within a regulated industry, like airlines, is "senseless" anyway and wthout public advantage. "Airline competition," according to the travel editor of *The New York Times*, "is a kind of Twentieth Century myth, since where it counts—in price—domestic aviation is a monopoly with the price fixed by the Civil Aeronautics Board."[56] Accordingly, goes the argument, why should competition between rival carriers (certainly between more than two on any given route) be tolerated; it offers no real benefit and only increases airline costs.

To appraise these positions and to assess meaningfully the conclusion they are supposed to support, it is necessary to review some basic facts concerning the character of the airline industry and then consider the recent policies of the CAB.

A. *Character Of The Industry*

The domestic airlines, under federal administrative regulation since 1938, fall into four distinct categories—the trunk carriers, now eleven in number (representing through merger and abandonment a decline from the 23 originally certified); the local service, or feeder, airlines, now 13 in number (also representing a reduction from the 23 which have been authorized to provide service by the CAB in the years since 1938); the irregular, or nonscheduled, carriers; and the domestic all-cargo lines.[57] This article is concerned almost exclusively with the situation of the trunk carriers, which continue to provide the great bulk of domestic passenger service. It might be useful to note however, that the local service airlines are growing far more rapidly than the trunk lines; from 1955 to 1961, for instance, the feeder lines increased their revenue passenger miles by 190%, whereas the trunk lines traffic increased by only about 52%. The feeder carriers are profiting both from a sheer increase in traffic between the communities they always served and also from new routes which they have been granted (between 1951 and 1961 their route system has nearly doubled, now serving 580 cities compared with 384 a decade ago).[58] The trunk airlines continue, though, to provide most of the nation's passenger service.

In 1961, of a total of about 31 billion revenue passenger miles flown, the eleven trunk carriers accounted for 29.5 billion. In terms of structure the airline industry is a fine example of oligopoly—that is, a context in which a few firms supply the relevant service. In 1961 the

[56] New York Times, Feb. 4, 1962, § 10, p. 1, col. 6-8. There are others in the anti-competition camp: Tipton & Gewirtz, *The Effect of Regulated Competition on the Air Transport Industry*, 22 J. Air L. & Com. 157 (1955) (this reflecting the ATA attitude, with which the authors were associated and of which Mr. Tipton is now president); Bluestone, *The Problem of Competition Among Domestic Trunk Airlines*, 20 J. Air. L. & Com. 379 (1953), 21 J. Air L. & Com. 50 (1954).

[57] An excellent portrayal of the domestic airline passenger industry may be found in Report of the House Judiciary Subcommittee, Airlines 8-33, 85th Cong., 1st Sess. (1957). Also see Fulda, Competition in the Regulated Industries: Transportation (1961); Gray, The Air Transport Industry, in Adams, The Structure of American Industry, ch. XII (rev. ed. 1954).

[58] Air Transport Association of America, America's Local Service Airlines (mimeo. May 10, 1962).

Big Four carriers accounted for about 73% of all the revenue passenger miles flown by the trunk lines. A complete breakdown is presented below:

TABLE 4. DOMESTIC TRUNK CARRIERS' REVENUE PASSENGER MILES, 1961

	number (millions)	*percent*
All Domestic Trunk Carriers, Total	29,704	100.0
United	7,496*	25.0
American	5,965	20.1
TWA	4,287	14.4
Eastern	4,007	13.5
Total, Big Four	21,755	73.0
Delta	2,189	7.4
National	1,137	3.8
Braniff	1,070	3.6
Northwest	1,025	3.5
Continental	902	3.0
Western	874	2.9
Northeast	752	2.5

* Includes Capital

Source: Table 7 *infra.*

Compared with others, the airline industry is very highly concentrated—more so, say, than steel, drugs, electrical equipment, or chemicals.[59]

A more accurate picture of the extent of concentration in the trunk industry, however, can be gained only by examining the characteristics of service along particular routes. This leads to several general observations. First of all, most of the routes connecting most of the 580 cities that receive scheduled airline service are monopolized; only one carrier provides the service, if indeed anyone does (obviously not all points receive service to all other points other than through interchange). Second, on most competitive routes only two carriers are involved, of which typically one is dominant. Third, only on a comparatively few, but quantitatively more important routes, are there three or more competing carriers; even here rarely are there more than three earnest rivals. Between New York and Chicago, for example, of the six airlines providing service, three carry 96% of the traffic, with American accounting for 43% and United for another 37%. Even on the most heavily authorized route in the country—New York-Washington, where eight lines can offer service—four carriers account for virtually all of the traffic, with two (American and Eastern) composing nearly 70% of the total. Below is presented a chart which indicates the highly concentrated character of a number of selected, high-density routes.

[59] For a presentation of concentration data in a number of manufacturing industries, see Kaysen and Turner, Antitrust Policy (1959), statistical appendix tables 1, 4. A more comprehensive listing, though less refined, is in a Report of the Senate Antitrust Subcommittee, Concentration in American Industry, 85th Cong., 1st Sess. (1958). Kaysen and Turner, interestingly, term airlines a highly concentrated industry—"still oligopolistic but significantly less concentrated." *Id.* at statistical appendix table 6, p. 290.

TABLE 5. DIVISION OF TRAFFIC AMONG AIRLINES ON SELECTED DOMESTIC ROUTES, 3d QUARTER 1961

Route	share of traffic carried by One Carrier	Two	Three
New York - Boston	48%	73%	91%
Los Angeles - San Francisco	62	92	99
New York - Chicago	43	80	96
New York - Washington	43	70	86
New York - Miami	44	77	99
New York - Los Angeles	43	81	99
New York - Detroit	60	86	88
New York - San Francisco	38	71	99
New York - Cleveland	94	*	*
New York - Pittsburgh	49	95	*
Chicago - Los Angeles	33	57	79
Las Vegas - Los Angeles	60	75	83

* Insignificant

Source: CAB. Competition Among Domestic Air Carriers, 3d Quarter 1961.

On either basis, therefore, taking the trunk line industry as a whole or on specific routes, a very high level of concentration is indicated. And, with comparatively few exceptions, the dominant carriers are the properly-named Big Four—United (which became the largest through its recent merger with Capital), American, TWA, and Eastern (see table 4). The reason for their prominence (their relative magnitude has not changed greatly since 1938) is primarily attributable to the fact that they serve more of the larger traffic-generating cities. In 1960, the FAA classified 23 cities as so-called large traffic hubs; these accounted for 67.5% of all airline passengers. (Another 35 medium traffic points accounted for an additional 18.4%).[60] Of the 23 large traffic locations American Airlines, for example, serves 16 (including such major points as New York, Chicago, and Los Angeles) and is authorized to provide service between most of them. Indeed, of the top 58 traffic-producing communities in the United States, American Airlines serves 40. This is the key to its position and to the similar status of the other members of the Big Four: routes connecting a large number of the major traffic junctures which they have held since the first days of regulation under "grandfather" certification.[61]

In view of the intense concentration that pervades the trunk airline industry, and the various specific route segments, is there then any meaningful degree of competition? Put another way, with concentration so high does it make any sense to strive for maintaining competition? Some writers would answer in the negative, placing particular stress on the

[60] The Project Horizon Report puts the matter a little differently: "Domestic air passenger traffic presently is concentrated at relatively few of the 580 cities served. In 1960 the 25 leading traffic centers alone originated and terminated about two-thirds of all the domestic passenger-miles flown, and about 75 per cent of all the domestic passengers carried. Further, the first 100 cities accounted for more than 90 per cent of both passenger-miles and passengers." *Supra* note 15, at 180.

[61] "The nature of the routes of the Big Four carriers, of course, gives them opportunity to develop large traffic volumes by tapping major pairs of metropolitan centers, particularly those of long-haul characteristics where air travel has more distinct time advantages over surface travel." Hearings before the House Antitrust Subcommittee, Monopoly Problems in the Regulated Industries: Airlines, 84th Cong., 2d Sess. (1956), vol. 1, p. 508.

fact that the industry is regulated (and perhaps also reflecting limited faith in the virtues of competition). The facts, however, point in just the opposite direction, suggesting strongly that competition retains substantial value even in this particular context. Admittedly in concentrated markets one does not find the kind of uninhibited competition that exists in, say, the garment industry. Here, where Chamberlin's "monopolistic competition"[62] reigns, the rival sellers are aware that their actions will affect their compatriots and are thus unlikely to go without response, just as if General Motors lowers the price on the Chevrolet, Ford can be expected to follow suit. Thus in considering any "competitive" step any one of the firms must anticipate not only the market's response but also the reactions of its rivals. Inevitably this leads to a kind of tacit collusion, or spontaneous coordination.[63] And the airline industry provides a good example. By and large fares are uniform (they needn't be, for the CAB does not set fares, as some writers appear to think, it only responds to proposals made by the carriers), plane departures for the same destinations are scheduled at about the same time during the day, flight equipment is substantially identical, etc.

Nevertheless, as studies of the airline industry over the post-war years have amply established, competition, even within the limits which exist, has resulted in a number of innovations that have had distinct public benefit.[64] This has been particularly true in the case of equipment introduction; being the first in service with a better, faster plane has represented a competitive advantage eagerly sought—something which is unlikely to have been true absent the competitive spur. The American-United equipment rivalry is illustrative.[65] In 1946 American Airlines, for example, was the first to put the Convair model 240 in service (a definite improvement over the DC-3). United soon countered with the initial acquisition of the Convair 340. But American placed the initial order for the DC-7 and made first use of the Lockheed Electra (which, though ill-fated, permitted flights at average speeds in excess of 400 mph). In 1955 the two carriers again competed vigorously in jet acquisitions.[66] American gambled by ordering the Boeing 707 while United waited for the Douglas DC-8, with the result that American had jets in service before United. The latter, however, was the first to place an order for a medium-range jet, arranging to purchase the French-made Caravelle.

The advantages of competition are also discernible in the case of coach class service.[67] United had first provided coach flights between Los Angeles and San Francisco in 1940, but shortly abandoned the endeavor for fear that it would divert passengers from first class. Likewise, American's president spoke warmly of coach service in 1945. Yet it was neither of these large airlines that inaugurated coach flights. Instead it was Capital

[62] Chamberlin, The Theory of Monopolistic Competition (7th ed. 1956). Through Chamberlin's emphasis is on product differentiation as distinct from structural oligopoly, the qualities are both involved in the airlines situation.

[63] See Fellner, Competition Among the Few (1949) for a more complete description of the processes of oligopolistic interdependence.

[64] Generally, Richmond, Regulations and Competition in Air Transportation, ch. IV (1961); Gill and Bates, Airline Competition, ch. II (1949) *passim*.

[65] Many of these episodes are examined in Stryker, *There's More Than One Way to Run an Airline*, Fortune, October 1961, p. 96.

[66] *Id.* at 152-58.

[67] This particular instance of airline competition has been recounted by Cherington, *supra* note 41, ch. VI; also see Stryker, *supra* note 65.

that did so, in 1948—spurred on, incidentally, by the success which the irregular operators were having. American did not enter the coach race until 1949 (but when it did so it used the DC-6 and offered coach flights at more convenient hours) and United remained on the sidelines until 1950. Once in the business American offered sharp competition, using the faster DC-7 for coach service in 1956 without any extra charge (United reluctantly followed suit in 1957).

Other instances of the value of having a number of competitors in the market can be cited. Capital (a small carrier, it should be noted) was the first to use turbocraft equipment (in 1955). National was the first to offer pure-jet service (in 1958). American inaugurated the family-fare plan. TWA offered the first mixed-class service (in 1955). Allegheny Airlines, a local-service carrier, provided the first no-reservation service. National, in 1959, initiated a service at less than coach rates, reflecting the sharp competition that has characterized the New York-Miami run since 1956.[68] And Eastern, on service between New York and Washington, began the since-highly successful air-shuttle, a no-reservation, no-waiting, less than coach fare service.

No one suggests that the foregoing illustrations add up to the unrestrained kinds of rivalry one might find in a market exhibiting a low level of concentration. But they are nonetheless of considerable value to the traveler. Without competition firms inevitably tend to be stodgy, lethargic, unduly skeptical of innovation; and this seems just as true, if not more so, where the industry is under government regulation. Eastern Air Lines, for instance, in the period before it was subjected to competition on its New York-Houston and St. Louis-Southeast routes, used old, poor equipment (even high-density coach-type seating configurations for first-class service) and generally offered a low grade of accommodation; indeed this was one major reason why the CAB authorized other lines to begin service over these routes.

But there is also value in having more than two carriers, *ceteris paribus*. Where there are only two competitors the probabilities are much greater that the tone of competition will be markedly less than if three are involved. In the latter case the impact each has on the other when inaugurating a given change in policy normally will be less pronounced, and thus more likely not to be followed—at least not promptly. Hence there is more incentive for experiment—with newer equipment, with a change in schedule, perhaps with a promotional fare arangement (Eastern's use of the air-shuttle was adopted by Northeast Airlines, but only after several months had elapsed; and American has declined to follow at all—losing position in the market as a consequence).

The record strongly evidences the merits of competition in the industry and along specific routes. A larger number of competitors, even if it be

[68] National, Eastern, and Northeast have contested vigorously for traffic from the New York-New England area to Florida, offering significant fare concessions as an inducement. As of this spring seven different fares were in effect, depending on whether the trip was made at night or day, first class or coach, prop or jet; the fares ranged from a high of $108.95 (one-way, without tax) to a low of $58.65. Official Airline Guide (April 1962), pp. C-214/216, C-231, C-169/172. Of obvious benefit to the traveler, it is fair to conclude that this range of fare choices is the direct product of competition. On less competitive routes the range of choice is markedly less. In the face of such evidence it seems absurd to refer to useful rivalry of this type as "silly and truly noncompetitive," as did a writer recently. New York Times, Nov. 19, 1961, § 10, p. 1, col. 1-5.

only three instead of two, is likely to have distinct, though not always predictable, public reward. Implicitly the CAB appears to have shared this attitude in the period since 1955, for during this period it has greatly accentuated the degree of competition.

B. *CAB Policy Since 1955*

Let it be said at the outset that any effort to delineate CAB policy is fraught with danger, simply because the Board is noted for its propensity to alter its attitude frequently[69] and for its ability to obscure the grounds for its action. In the Board's behalf let it be admitted, however, that the pertinent statutory language is itself ambiguous. The Board is admonished by the Aviation Act to "consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity. . . . (d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce to the United States. . . ." This legislative declaration provides no clear guidance, in fact it is to a degree contradictory, and thus we should probably not be surprised at the Board's ambivalent interpretations.[70] From 1938 to about 1944, for example, it invoked "a strong, although not conclusive, presumption in favor of competition on any route which offered sufficient traffic to support competing services without unreasonable increase of total operating cost."[71] Never did it articulate what amounted to "sufficient traffic" or what was an "unreasonable increase of total operating cost"; but still it seemed favorably disposed to more competition as a factor which assists in the fullest development of the national air transportation system.

Beginning about 1944, however, the Board abandoned the presumption doctrine. If existing service were deemed adequate new awards were rarely made, the Board majority (the dissenters usually referred to the decisions as reflecting an "anticompetitive philosophy") cynically disowning competition under such circumstances as amounting to no more than "competition for competition's sake"[72] (reminiscent of language from the early depression years of the 1930's).

In 1955, under the guidance of its new chairman, Ross Rizley, the Board once more swung back to a policy of favoring competition wherever there was sufficient traffic.[73] Not only did it feel that competition was conducive to the vigorous development of air transportation, but it felt it might offer other advantages—such as eliminating airline subsidy by permitting weaker carriers to tap richer markets.

Commencing in 1955 the Board went about the job of increasing trunk airline competition with unrelenting zeal. In a series of decisions, begin-

[69] "The Civil Aeronautics Board in the course of its very short history has shown an almost incredible flexibility in moving toward and away from competition." Jaffe, Book Review, 65 Yale L.J. 1068, 1074 (1956).

[70] 72 Stat. 740 (1958), 49 U.S.C. § 1302 (1959).

[71] Transcontinental and Western Air, Inc. et al., Additional North-South California Services, 4 C.A.B. 373, 375 (1943). The most comprehensive review of the Board's actions in this earlier period is Westwood, *Choice of the Air Carrier for New Air Transport Routes,* 16 Geo. Wash. L. Rev. 1 (1947), 16 Geo. Wash. L. Rev. 159 (1948).

[72] *E.g.,* Northwest Air, et al., Chicago-Milwaukee-New York Service, 6 C.A.B. 217, 228 (1944).

[73] For general treatments of the post-1955 period, see Richmond, *supra* note 64; Gellman, *The Regulation of Competition in the United States Domestic Air Transportation: A Judicial Survey and Analysis,* 24 J. Air L. & Com. 410 (1957), 25 J. Air L. & Com. 148 (1958); Richmond, *Creating Competition Among Airlines,* 24 J. Air L. & Com. 435 (1957).

ning with the *New York-Chicago Service* case in 1955[74] and most recently in the *Pacific-Southwest Local Service* case,[75] the CAB opened up a number of markets to other carriers, as indicated below:

SELECTED MARKETS WITH INCREASED COMPETITION, 1955-1961

Increased from one to two or more carriers

New York - Dallas	New York - Houston
Dallas - Los Angeles	Dallas - San Francisco
Chicago - Denver	St. Louis - Miami

Increased from two to three or more carriers

Los Angeles - San Francisco	New York - Miami
New York - Atlanta	New York - New Orleans
Chicago - Miami	

Increased from three to four or more carriers

New York - Detroit	New York - Chicago
New York - Washington	Boston - Washington

Between 1955 and 1957 the Board provided new or improved competitive service to at least 514 city pairs.[76] Dozens of routes which formerly had been the monopoly domains of grandfather carriers, particularly of the Big Four, were opened up to hunting by new entrants. The result was that where in 1955 more than 44% of revenue passenger miles were carried on routes effectively monopolized (i.e., where one carrier handled 90% or more of the traffic), by 1960 this had declined to 27.8%.[77]

Unquestionably the Board has taken immense strides during the last seven years in increasing competition in the domestic trunk airline industry. What is less clear, however, is the precise rationale for its actions. Of course, it favored competition as a general rule; yet it also recognized that not all markets were suitable candidates because of indaequate traffic. But why it made the specific determinations in individual cases is not always clear. Indeed, as other critics have frequently pointed out (Louis Hector for one,[78] and more recently Judge Henry Friendly[79]), the Board's opinions simply do not opine. Rather they recite any of a number of objectives that are deemed desirable, announce that the instant decision promises their fulfillment, and add the old caveat that the facts of each case govern. The result is to leave the reader with very little guidance for the future and with only a vague understanding of what explains the Board's conclusion.

Running through all of the major cases from 1955 to 1961 (and perhaps to date, although this is increasingly hard to determine), though, is the theme that "competitive service holds the greatest prospect for vigorous

[74] 22 C.A.B. 973 (1955).

[75] 1A Av. L. Rep. ¶ 21,248 (1962).

[76] Richmond, *supra* note 64, at 130 *passim*.

[77] Exhibits AE 153-54.

[78] Hector, *Problems of the CAB and the Independent Regulatory Commission*, 69 Yale L.J. 931 (1960). One of the reasons no doubt lies in the use of professional opinion writers. "Members of these opinion writing staffs explain that they consciously avoid statements of general principle as much as possible in the opinions they write, because they must be able to write an opinion justifying an opposite conclusion the next day, and hence must not be hampered by prior statements of general principles." *Id.* at 942-43.

[79] Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv. L. Rev. 1055, 1072-97 (1962). Judge Friendly was formerly counsel to Pan American World Airways.

development of our national air transport system." This attitude appears to underly the various decisions, for once the Board takes this stance and repudiates the idea, as it did in the *Southwest-Northeast Service Case*,[80] that the existing service must be found inadequate before there can be any increase in route competition, conditions are manifestly conducive to additional service awards. This is not to say that the only goal which the Board has wished to achieve is an increase in competition. Indeed in every major case of the last seven years there were a number of factors involved in the decision. In some cases existing service was simply not adequate. On its New York-Houston[81] and St. Louis-Miami operations,[82] for instance, Eastern Air Lines, the only authorized carrier, had been using second-rate equipment and generally offering a low-grade service; competition, the Board felt, would provide a remedy, leading to more service and stimulating the established carrier as well.

But in the final analysis the CAB has been governed by the feeling that competition is desirable per se and offers a way to achieve greater balance in the industry without working significant economic hardship on the bigger carriers. In the *New York-Florida Case*,[83] for instance, the Board authorized Northeast Airlines to provide a third-carrier service between points in the northeast and Florida. One of the principal reasons for doing so, and in preferring Northeast over other applicants (Delta most notably), was to give Northeast access to a high-density, long-haul market in the expectation that this would make continued subsidy unnecessary. In the *Southwest-Northeast Service Case* the Board, in awarding Braniff the New York-Dallas route, explained:

> Unless the relative economic opportunity — and basically this means route systems — of the smaller carriers approaches more closely that of the Big Four, their competitive position and ability to weather economic adversity are bound to suffer. . . . It is of considerable significance that the dominance of the Big Four flows from their access to the high-density markets, and this enables them to attain greater economy in operating costs and flexibility in scheduling of service.[84]

This policy also largely explains route awards to Capital and Northwest in the *New York-Chicago Service Case*[85] and to National in last year's *Southern Transcontinental* decision.[86]

In making the various competitive awards the Board has been obligated, of course, to consider the scale of the respective market in assessing whether the existing carrier(s) can withstand competition. In the *New York-Chicago* case, as an illustration, American Airlines argued that the

[80] Southwest-Northeast Service Case, 22 C.A.B. 52 (1955).
[81] *Id.* at 65.
[82] "There is considerable evidence in the record to show that the service provided by Eastern is not comparable with that offered in competitive markets. . . . For example, the record shows that Eastern continued to use five-abreast seating in first-class flights until late 1956, long after it had introduced more convenient configuration in competitive markets; and the carrier utilized only slow unpressurized DC-4 aircraft for St. Louis-Miami nonstop service until the winter of 1956. In addition Eastern failed to provide nonstop service with modern equipment between St. Louis and Atlanta until 1956. At most, Eastern provided only limited frequencies in the St. Louis-Southeast markets, with resulting space shortages and unduly high load factors." St. Louis-Southeast Service Case, 27 C.A.B. 342, 346 (1958).
[83] 24 C.A.B. 94 (1956).
[84] 22 C.A.B. 52, 57-58 (1955).
[85] 22 C.A.B. 973 (1955).
[86] 1A Av. L. Rep. ¶ 21,131 (1961).

New York-Detroit route could not support more than a single carrier. To this contention, a kind that can be found in each major decision, the Board replied, in rather typically evasive fashion:

> In our judgment, the size and potential of the New York-Detroit market will now support three turnaround services rather than merely one heretofore operated by American. Thus the record shows that in this area the New York-Detroit market is exceeded only by the New York-Chicago market, and yet American is the only unrestricted operator between New York and Detroit. The much smaller New York-Cleveland market has two turnaround services. Furthermore, the New York-Detroit market increased by 86 percent from 1949 to 1954. Under such circumstances, we have no hesitation in finding that the New York-Detroit market will support two additional services.[87]

This is really no more than a bootstraps argument, for one can search without avail for an explanation of why the New York-Cleveland market can support two services. Moreover, even if the Cleveland route can sustain two rivals, what rationalizes three in the Detroit market (why not just two, or perhaps four)? The other decisions are likewise unhelpful. Thus, a third service was authorized between New York and Miami with the bare explanation that "there can be little question that the markets here involved are in material aspects more than comparable to those for which in recent cases we have authorized service by more than two carriers";[88] between the Great Lakes and the South ("We are convinced that the traffic is sufficiently large now and has the inherent potential to support another carrier in addition to Delta and Eastern. The Chicago-Miami market is by far the largest two-carrier market in the country and has shown an impressive continuing growth. . . .");[89] and just this year between Los Angeles and San Francisco (this "is one of the largest air traffic markets in the country . . . the tremendous traffic generating ability of the market accounted for more than a million local passengers in 1958, even outproducing the important New York-Miami market").[90] Similar language, equally unsatisfying, can be found in other opinions supporting awards which meant a competing (or second) carrier, as in the *St. Louis-Southeast Service Case*[91] and in the *Southwest-Northeast*[92] decision.

While it is not always easy to detect the logic in the Board's decisions, the fact clearly is that from 1955 to 1960 the extent of airline competition in the United States was greatly expanded. As mentioned earlier, the monopolized routes declined from 44% to 27.8% during those five years. Moreover, the amount of traffic carried on routes where only two airlines competed also declined as a result of additional awards; from 1955 to 1960 the proportion of revenue passenger miles carried on routes where there were three or more effective competitors rose from 15.8% to 32.4%. But this does not reveal the extent to which the various trunk airlines individually were affected. Table 6 presents this information.

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[87] 22 C.A.B. 973, 991 (1955).
[88] 24 C.A.B. 94, 98-99 (1956).
[89] Great Lakes-Southeast Service Case, 27 C.A.B. 829, 846 (1958).
[90] Pacific-Southwest Local Service Case, 1A Av. L. Rep. ¶ 21,248 (1962), at pp. 14,715-16.
[91] St. Louis-Southeast Service Case, 27 C.A.B. 342 (1958).
[92] 22 C.A.B. 52 (1955).

TABLE 6. AMOUNT OF TRAFFIC CARRIED BY DOMESTIC TRUNK AIRLINES UNDER MONOPOLY AND COMPETITIVE CONDITIONS

(percentage of revenue passenger miles carried)

Carrier	*Monopoly Traffic*		*Traffic on Routes with Two or More Other Carriers*	
	1955	*1960*	*1955*	*1960*
American	41.4%	22.8%	30.7%	39.1%
Braniff	67.6	49.8	0.3	5.1
Capital	50.8	29.5	9.9	26.4
Continental	87.5	34.8	0.1	27.4
Delta	62.1	41.1	0.8	18.6
Eastern	53.7	26.3	1.6	31.4
National	19.8	22.0	1.0	55.4
Northeast	91.3	20.1	8.4	66.8
Northwest	40.7	26.1	0.2	13.2
TWA	37.1	21.2	25.2	42.9
United	38.7	29.0	19.3	29.5
Western	45.6	46.6	7.9	9.9
Weighted average	44.4	27.8	15.8	32.8

Source: Exhibits AE 153-54.

As is evident, by 1960 all but two of the airlines carried less traffic under monopoly conditions than in 1955. But the smaller carriers received most of the new route awards, thus tending to offset the greater degree of competition they were being subjected to in their older markets. In terms of new service authorization equivalent to or better than that of the least restricted other carriers, Professor Richmond found that 88% of the new passenger exposure and 83% of the passenger mile exposure went to the smaller eight (now seven) airlines. American and Eastern received access to less than 1% of the potential new passenger miles. United gained access to about 4%, and, surprisingly, TWA about 13% (this was as good as for any other carrier except Northeast).[93] On paper, therefore, the smaller carriers received the bulk of the new route awards, after making adjustment for operating restrictions and other such factors. But what are the lessons of history? How have the various carriers been affected?

C. *General Consequences*

In spite of the CAB's strong efforts to achieve greater balance within the industry by granting the smaller airlines access to richer routes, the Big Four still retain a commanding position within the industry. In 1955, the last year before the Board's new policy took hold, the four leading airlines carried about 74.5% of all revenue passenger miles. By 1960, as Table 7 shows, this share had declined, but only slightly, to 71.5%; in 1960 it rose to 73.0% (largely because of the United-Capital merger). The share of revenue mileage held by the smaller carriers increased in every case except for the Northwest and National (whose position will definitely improve due to its 1961 *Southern Transcontinental* award.[94]

[93] Richmond, *supra* note 64, ch. IX and especially tables IX-5/IX-14.
[94] *Supra* note 86.

TABLE 7. REVENUE PASSENGER MILES FLOWN, TRUNK AIRLINES, 1953-1961

Carrier	*1961*	*1960*	*1959*	*1958*	*1957*	*1956*	*1955*	*1954*	*1953*
American	5,965	6,257	5,614	4,891	5,036	4,793	4,266	3,372	3,210
% of Total	20.1	22.2	20.0	20.0	20.6	22.2	22.3	20.9	22.7
United	7,496	5,355	4,827	4,915	4,583	4,249	3,754	3,135	2,575
% of Total	25.0	19.0	17.2	20.1	18.7	19.7	19.7	19.4	18.2
Eastern	4,007	4,046	4,432	3,811	4,397	3,788	3,342	2,847	2,309
% of Total	13.5	14.4	15.8	15.6	17.9	17.5	17.5	17.6	16.3
TWA	4,287	4,451	4,579	3,662	3,656	3,261	2,866	2,611	2,370
% of Total	14.4	15.8	16.3	15.0	14.9	15.1	15.0	16.2	16.8
Big 4 Total	21,755	20,109	19,452	17,279	17,672	16,091	14,228	11,965	10,464
Big 4 % of Total	73.0	71.5	69.2	70.7	72.1	74.5	74.5	74.1	74.0
Braniff	1,070	1,053	935	913	865	718	605	537	463
% of Total	3.6	3.7	3.3	3.7	3.5	3.3	3.2	3.3	3.3
Capital	*	1,492	1,611	1,413	1,513	1,019	792	746	695
% of Total		5.3	5.7	5.8	6.2	4.7	4.1	4.6	4.9
Continental	902	885	672	419	363	259	221	167	148
% of Total	3.0	3.1	2.4	1.7	1.5	1.2	1.2	1.8	1.1
Delta	2,189	1,832	1,556	1,400	1,314	1,124	953	787	624
% of Total	7.4	6.5	5.5	5.7	5.4	5.2	5.0	4.9	4.4
National	1,137	1,016	1,101	990	894	945	850	694	572
% of Total	3.8	3.6	3.9	4.1	3.6	4.4	4.4	4.3	4.0
Northeast	752	565	519	407	245	119	116	104	91
% of Total	2.5	2.0	1.8	1.7	1.0	0.6	0.6	0.6	0.6
Northwest	1,025	1,337	1,384	1,111	946	872	823	749	720
% of Total	3.5	4.8	4.9	4.5	3.9	4.0	4.3	4.6	5.1
Western	874	944	896	503	687	457	514	401	359
% of Total	2.9	3.4	3.2	2.1	2.8	2.1	2.7	2.5	2.5
TOTAL	29,704	28,126	28,126	24,435	24,499	21,604	19,102	16,150	14,136

* Capital's mileage, 601 million for the first five months of 1961 is included in that of United due to their merger. For earlier years the effects of other mergers involving the trunk airlines listed is similarly treated.

Source: Civil Aeronautics Board.

Northeast (because of its 1956 New York-Florida award), Continental (with recent extensions from Chicago to Denver and Denver to Los Angeles), and Delta (benefitting from service authorizations between New York and Houston, New Orleans, and Atlanta) registered particularly healthy traffic increases.

In the final analysis, however, what counts is profits. As the foregoing discussion and the details presented in Table 7 demonstrate, the smaller carriers generally gained some traffic at the expense of the larger airlines, particularly American and Eastern. But the recently-authorized awards have not bolstered profitability for the weaker carriers in spite of their heavier passenger traffic. Northeast is not a good test (it was in serious difficulty when it was granted entry to the New York-Miami market),[95] but even Delta and Continental, which, relatively, benefitted more than the other lines, still found their profit margins slipping between 1955 and 1961. The same is true for all of the others. One is properly entitled to ask: what happened?

For one important thing passenger traffic has not increased as rapidly since 1957 (precisely when the CAB began to make its numerous new competitive route awards) as in the immediately preceding years. Take the New York-Washington route as an illustration. In 1956 this route was dominated by American and Eastern, the former carrying some 63% of the passengers who moved between those two points. Northeast Airlines was thereupon authorized to serve the route, the Board insisting that whatever diversion would result will "come out of future traffic growth in the markets involved."[96] But by 1961, as Table 8 shows, traffic between the two points had increased by only about 10% (or about half that of the domestic trunk industry as a whole). Of this somewhat larger market American now carried 26% of the total, Eastern 42%, and Northeast about 20% (the remainder divided among National and other carriers). Thus, while the market had expanded, it had not done so sufficiently to offset the dilution that Northeast's entry had brought about. The same is true of the most important of the other routes over which increased competition had been sanctioned. Indeed, just as the Board began to step up the degree of competition, relying on the markets' rapid past growth, traffic dried up, as Table 8 well demonstrates. The New York-Miami route, where traffic had increased by 51% from 1954 to 1957, grew by only 3.6% from 1957 to 1960. The New York-Houston and New York-New Orleans markets actually shrunk. Hence the various pies which the Board decided to carve into a larger number of pieces, on the theory that the pies would get bigger and continue to be divisible equitably, simply stopped growing—with rare exception. What is responsible for this sharp decline in the rate of passenger traffic growth is not easily determined. No doubt the two recessions, 1957-1958 and 1960-1961, bear some of the blame. A miscellany of other explanations could be added. But, as the discussion earlier suggested, the rapid post-1958 fare increases cannot be overlooked. While airline fares had not increased at all between 1954 and 1957, from 1957 to 1960 fares went up by about 21% (if the jet differ-

[95] Indeed at the time the award was made two members of the Board dissented, with Member Denny firmly convinced that Northeast was simply not able to make effective use of the Florida routes. For one thing it lacked equipment comparable in size and speed to that already in use by Eastern and National. 24 C.A.B. 94, 124 (1956).

[96] 24 C.A.B. 94, 105 (1956).

ential is taken into account). It is reasonable to expect that this would have a particularly noticeable impact on routes heavily patronized by tourists, such as New York-Miami or New York-New Orleans. Obviously other forces have been at work; but it is foolish to think that fares can be raised without retarding traffic growth.

TABLE 8. AIRLINE TRAFFIC GROWTH, SELECTED MARKETS, 1954-1960

*Market**	*Year (millions of revenue passenger miles flown)*			*Percentage Increase*	
	1954	*1957*	*1960*	*1954-1957*	*1957-1960*
Total, All Trunk Traffic	16.20†	24.4†	29.2†	51%	21%
New York - Detroit	111	163	182	47	12
New York - Chicago	393	514	596	31	16
New York - Miami	651	984	1,019	51	4
New York - Dallas	80	127	168	59	32
New York - Washington	101	135	149	34	10
New York - Boston	101	139	167	38	20
New York - Houston	87	129	124	48	-4
New York - New Orleans	67	110	97	64	-12
New York - Atlanta	64	84	95	31	13
Chicago - Denver	31	47	66	52	40
Chicago - Detroit	52	63	64	21	2
Denver - Los Angeles	35	65	100	86	54
Chicago - Los Angeles	255	349	478	37	37
New York - San Francisco	444	663	780	49	18
New York - Cleveland	77	111	118	44	6

* Markets selected are ones in which degree of competition has been covered by CAB action, 1955-1962.

† In billions

Source: CAB. Competition Among Domestic Air Carriers; Richmond, *supra*, note 64, appendix 3; 1962 ATA Facts and Figures, p. 17

Since it possesses the power to suspend fare proposals made by the airlines the CAB may, therefore, actually have been working at cross-purposes over the past seven years—accepting substantial fare hikes that were likely to slacken the very traffic growth that was essential to the successful implementation of its policy of increasing competition. There are some indications that the Board may recognize this possible inconsistency. Recently it has spoken clearly of the need for greater promotional efforts on the part of the airlines. In 1960 it approved a low-cost "air-bus" service between Pittsburgh and Miami, saying that this was consistent with its policy of "encouraging the filing of fares designed to promote air travel, particularly the low fare type of service designed to enable air transportation to penetrate more effectively into a larger market."[97] Nevertheless the Board insists that all air fares cover fully all allocated costs. (It reflected this attitude a few months ago in the *Pittsburgh-Philadelphia No-Reservation Fare Investigation.*)[98] This means that the airlines have too little room in which to experiment with fare reductions,

[97] Eastern Air Lines, Inc.—In the Matter of Local "Air-Bus" Passenger Fares, 1A Av. L. Rep. ¶ 21,067 (1960).

[98] 1A Av. L. Rep. ¶ 21,230 (1961).

strongly reinforcing their customary propensity to price in a highly conservative fashion. One is definitely reminded of the practice of the electric utilities to wait for consumption to increase before reducing prices; the airlines, too, believe that the demand for their services is inelastic until they see conclusive evidence to the contrary—in response either to fare increases or reductions. At the moment the trend to higher fares is clearly evident, with the airlines proposing and the CAB usually approving (with occasional minor modifications). This is well calculated to inhibit traffic growth and accentuate the problems created by the various competitive awards which have been made in recent years.

To American Airlines and the other advocates of trunkline mergers, however, the recent decline in carrier profits is explained basically by just one thing: increased competition stemming from the CAB post-1955 route awards. They find a distinct correlation between the decline in the amount of traffic carried under monopoly conditions and the shrinkage in airline profits.[99] In their opinion the immediate answer lies in a lessening of competition, and this they insist can best be accomplished through consolidation. There are, however, several flaws in this line of argument. First, if Northeast Airlines, which has been in serious difficulty since long before the CAB embarked on its program of stepping up competition in 1955, is excluded from the analysis, along with National, any meaningful mathematical correlation between profitability and the amount of monopoly traffic collapses.[100] Second, the recent decline in airline profits is at least as well explained by a reduction in the rate of growth of passenger traffic and by other factors, ranging from recession to the costs of jet acquisitions and their introduction, as by the Board's policy of increasing competition since 1955. The latter, of course, has contributed to airline problems, but it is not their cause. Third, explicit in the American-Eastern argument is the idea that increased competition accelerates costs and that, if curtailed, expenses could be reduced sufficiently to yield reasonable returns. For the trunk airlines as a group the cost per available ton mile went up from 26¢ to 29¢ between 1955 and 1960, and per revenue ton mile from 46.1¢ to 57.2¢. American insists that these increased expenses are attributable predominantly to increased competition and that if competition could be cut back to its 1955 level aggregate airline costs would fall by $200 million. But there are at least two difficulties with this presentation. For one, while costs have increased since 1955, so too have revenues; thus revenue per revenue ton mile has increased over this period from 51.6¢ to 58.3¢, more, relatively, than the cost per available ton mile.[101] The fact that the cost per revenue ton mile went up more than revenue per revenue ton mile suggests that the amount of service offered was unwisely expanded; it is difficult to link this with competition per se. Moreover, as a general matter the proof offered by American Airlines fails to establish that rising costs are attributable solely or even largely to more intensive competition. Rather they seem more easily traceable to the expenses incurred for jet purchases and introduction, to special conditions

[99] The American Airlines evidence is contained in a number of statistical exhibits. See exhibits AE-151/155, as explained in AE-F.

[100] Exhibit NAL-500/501. National and Northeast are the boundary specimens; in 1955 the former was the most profitable carrier although it had the least amount of monopoly traffic, and Northeast was the least profitable although it had the greatest amount of monopoly traffic.

[101] Exhibit AE-F, p. 4. For a rebuttal see NAL-500/501.

(equipment modifications, for example), and to a sharp drop in the growth of passenger traffic. Relevant to the latter is the information that Continental Airlines reported a drop in its costs per revenue ton mile from 1955 to 1960 as the apparent result of an increase in its passenger traffic. Suffice it to say that under these circumstances to blame competition for the recent decline in industry profits is totally unwarranted. Fourth, to the extent that a curtailment in existing levels of competition might be in order (as where independent study by the CAB might determine competition to be improvident beneath a certain traffic level), there is still grave doubt that airline consolidation represents the best means of accomplishing this objective.

The question of mergers, though, deserves further analysis, for it is the contention of American Airlines that merger, specifically with Eastern Air Lines, not only represents a solution to airline financial problems (an unconvincing argument, as indicated above), but will provide substantial public benefit without significant detriment. If this is true, then airline mergers may be desirable, whether they are proximately related to the industry's economic difficulties or not. Accordingly the American-Eastern merger, as a prime case in point, deserves close inspection—within a broader framework of the CAB policy as to mergers and their competitive implications.

III. Monopoly, Competition and the American-Eastern Merger

American Airline's application for approval of its merger with Eastern Air Lines, a consolidation viewed by the petitioners as the solution to their problems and as a guide for the remainder of the industry, is now pending before the CAB. At this writing the hearing has just been finished, one that summoned forth the active intervention of most of the other trunk airlines (with Delta being particularly active in opposition) as well as diverse other organizations, not to overlook the Department of Justice.[102] It is American Airlines, however, which has the obligation in effect of going forward and establishing that the merger "will not be inconsistent with the public interest" and will not result "in creating a monopoly or monopolies."

In its behalf American argues principally that the merger will curtail some of the competition that has been generated of late by improvident CAB awards. (Admittedly this amounts to a slap in the face, but it is what the argument amounts to, devoid of diplomatic language.) Moreover, it is contended, the affiliation with Eastern provides an opportunity for achieving greater operating efficiency and permits new, through service connecting a number of the country's cities. American and Eastern now serve thirty common locations; in itself this means they can combine ticket offices, airport terminal facilities, hangars, etc. As well, since American's peak travel season occurs in the summer while Eastern's is in the winter, their capital requirements can be significantly reduced and more intensive use made of existing flight equipment. Thus the merger promises greater efficiency, lower costs, and improved service. As sort of a bonus, all of these qualities can be accomplished without adverse competitive effect. If so, it is indeed a rare and attractive undertaking. But

[102] Nor the CAB's own Bureau of Economic Regulation, which has opposed the merger.

there is reason to doubt the validity of these representations, particularly as to the merger's competitive consequences. To put this aspect of the case in its proper setting, however, first requires a perusal of the relevant legislation and of the Board's past merger decisions.

A. *Mergers And The CAB: A Search For Standards*

All mergers between airlines must be authorized by the CAB before they can be lawfully consummated[103]—but section 408(b) of the Federal Aviation Act of 1958 (in this respect identical to the comparable provision in the original 1938 federal legislation) requires approval unless the Board finds that the proposed arrangement "will not be consistent with the public interest."[104] This provision represents one of the principal ways in which the issue of competition-versus-monopoly is presented, for in defining "public interest" the Board invariably turns to section 102 of the Act which declares, as being in the public interest, "competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States. . . ."[105] Although this statutory declaration is lacking in any desirable degree of precision, nevertheless in its past consideration of merger applications the Board has leaned heavily on its language in finding that a given proposal was not consistent with the public interest. This was true in two of the leading merger cases, one involving United's proposed acquisition of Western Air Lines,[106] and the other American's planned purchase of Mid-Continent Air Lines.[107] In both decisions the Board seemed primarily disturbed over the possibility that the contemplated mergers, in each instance involving one of the Big Four and a markedly smaller truck carrier, would accentuate the overall degree of industrial concentration, contribute to greater imbalance and injure the weaker airlines. In the former United, operating from New York to San Francisco, and also authorized to fly between Seattle and San Diego, proposed to acquire Western, a major north-south system in the Pacific coast region. The two lines intersected at Salt Lake City. As the Board viewed the facts the merger would give United direct access to the entire west coast area for the origination of transcontinental traffic. This, it felt, was undesirable. "To allow one air carrier to obtain control of air transportation in the West Coast area greatly in excess of that possessed by competitors would . . . seriously endanger the development of a properly

[103] 72 Stat. 767 (1958), 49 U.S.C. § 1378(a) (1959). Once the Board approves a merger the parties affected are "relieved from the operations of the 'antitrust laws'." 72 Stat. 770 (1958), 49 U.S.C. § 414 (1959).

[104] 49 U.S.C. § 1378(a) (1959).

[105] 72 Stat. 740 (1958), 49 U.S.C. § 1302 (1959). In considering a similar legislative declaration pertaining to mergers coming under the jurisdiction of the Interstate Commerce Commission, the Supreme Court has ruled that the "public interest" criterion requires the ICC to "consider the effect of the merger on competitors and on the general competitive situation in the industry in the light of the objectives of the national transportation policy." The Court rejected the argument that the agency might disregard the antitrust policy since the statute did not expressly require its application. "Congress . . . neither has made the anti-trust laws wholly inapplicable to the transportation industry nor has authorized the Commission in passing on a proposed merger to ignore their policy." McLean Trucking Co. v. United States, 321 U.S. 67, 86-87 (1944).

[106] United Air Lines Transport Corporation—Acquisition of Western Air Express Corporation, 1 C.A.A. 739 (1940).

[107] American Airlines, Inc., Acquisition of Control of Mid-Continent Airlines, Inc., 7 C.A.B. 365 (1946).

balanced air-transportation system in this region."[108] A similar philosophy was apparent in the disapproval of American's purchase of Mid-Continent, the latter operating north-south, bisecting the nation in a relatively narrow path running from Minneapolis-St. Paul through Kansas City and Tulsa to New Orleans and Houston, with two legs extending into St. Louis. The Board, noting also that the two systems were relatively uncomplementary, was largely influenced by the possibility that American would have an undue competitive advantage in obtaining business, originating to and destined from points on the Mid-Continent routes. "[T]he wider the geographical scope of a carrier's operations in comparison with a particular rival, the greater the competitive advantage which it will enjoy through the control of traffic originating at or destined to points to which the other carrier does not have access."[109] (The close relevance of this statement to the American-Eastern merger can be noted later.)

The statute, while on the one hand requiring the approval of airline mergers unless found inconsistent with the public interest, also provides that "the Board shall not approve any consolidation . . . which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation. . . ."[110] Strangely, this part of the statute has received little clarifying interpretation. The Board, in disapproving a merger because of its competitive implications, has chosen over the years to rest its decisions, not on the monopoly proviso, but rather on the looser formulation of inconsistency with the public interest. Indeed, so far the CAB has not faced squarely the problem of implementing the monopoly proviso at all. Now the American-Eastern merger presents this precise issue and the Board can responsibly avoid the problem no longer.

The closest the CAB has come to defining the term "monopoly," as used in the Act, was in the 1940 *United-Western Interchange* ruling. There it determined, first of all, that "restraint of competition" is a factor "only if it results from that degree of control which [it] decides constitutes a monopoly of air transportation."[111] Thus, if there is no monopoly, there can be no restraint of competition, or at least so the Board interprets the Federal Aviation Act. Thus the ultimate test is whether the merger will result in creating a "monopoly." How then is that term to be defined? The Board, through a rather remarkable use of near meaningless words, has so far avoided any intelligent response.

In *United-Western,* the first and what in many respects remains the clearest case on the point, the Board said that "the word 'monopoly' . . . refers to a particular degree of control of air transportation, or any phase thereof, in any territory or section of the country." The "particular degree of control," of which the Board speaks, is said to refer to "the control of a particular business or article of trade, without regard to the results which may flow therefrom."[112] This is hardly satisfying. And in attempting to apply this definition the Board has only made the matter more obscure. For example, in approving a merger between Braniff and

[108] *Supra* note 106, at 750.
[109] *Supra* note 107, at 378.
[110] 49 U.S.C. § 1378(b) (1959).
[111] 1 C.A.A. 723, 733-34 (1940).
[112] *Ibid.*

Mid-Continent the Board noted that these two carriers had provided the only direct service between Kansas City and Houston. Certainly this would seem to create a monopoly of service between the two points, what could readily be termed a section of the country. But the hearing examiner (affirmed by the Board) concluded otherwise, saying that

> this removal of competition for passengers traveling between . . . [these two points] will not affect the amount of service now available, but on the contrary it appears that additional services will result. . . . Accordingly, it appears that the substitution of the merged company for the two separate companies, insofar as the provision of service between Kansas City and Houston is concerned, will not result in creating a monopoly which will restrain competition or jeopardize air carriers not a party to the merger.[113]

What this seems to mean is that while a monopoly admittedly was created, it was not such as to restrain competition. If this is an accurate reading, it makes no sense: the essence of monopoly *is* restraint of competition, for if the latter were not achieved indeed there could be no monopoly. It may, on the other hand, amount to a conclusion that no monopoly was created, even though the merger involved the only two airlines providing the only service between given locations. This likewise makes little sense.

Perhaps what the Board has in mind, without clearly saying so, is the notion that if a merger holds out the promise of better service (or more efficient operations, or what have you), the fact that it eliminates a competitor is unimportant.[114] This, if true, is implausible for if airlines *A* and *B*, which provide the only service between two given locations or which provide the bulk of the service (say, ⅔ or more), merge, it is difficult to argue that no monopoly has been established.[115] And the statute, whether one agrees or not, enjoins the Board from approving any merger the effect of which is to create a "monopoly or monopolies"; the fact that better service might result is completely beside the point. In this respect Congress clearly favored competition to monopoly, come what may.

Even though the CAB's handling of the competition-monopoly problem leaves a good deal to be desired, the standards which it has set forth, as outlined above, provide a general framework within which to appraise the merits of the American-Eastern merger. It will be useful to recall,

[113] Braniff-Mid-Continent Merger Case, 15 C.A.B. 708, 735 (1952).

[114] See Acquisition of Marquette by TWA, 2 C.A.B. 1 (1940). In upholding the Board's approval of last year's United-Capital merger the Court of Appeals for the District of Columbia, in a rather casual discussion of the issues, took something of the same attitude. It concluded that the consolidation would not create a monopoly, looking at the "whole picture" (whatever that means). Admitting that on four specific routes a monopoly would result the Court nevertheless said the merger would create competition, substituting a stronger carrier for a weaker. Northwest Airlines, Inc. v. CAB, 2 Av. L. Rep. 17,809 (D.C. Cir. 1962).

[115] At an early date the CAA seemed to recognize the necessity of defining the relevant market in assessing the likelihood that a monopoly would be created. United Air Lines Transport Corporation and Western Air Express Corporation—Interchange of Equipment, 1 C.A.A. 723 (1940). There the agency said that the term "monopoly" refers to "a particular degree of control of air transportation, or any phase thereof, in any territory or section of the country," citing authority which directly involved the matter of market definition. *Id.* at 733-34. And within the context of air transportation it is perfectly reasonable to argue that the "market" consists of the direct routing between certain cities. Hence, where a merger will join, say, the only two carriers operating on a given route, monopoly is the result and the statute forbids the approval of mergers in such cases. Furthermore, less than total control of a given market can also amount to monopoly, as the courts have pointed out in their interpretation of section 2 of the Sherman Act. At least with two-thirds of the market—probably much less—a firm can exercise a high degree of control over price and other relevant variables, and this control is the ultimate criterion of monopoly. See United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

too, that since 1955 the Board has been intent on creating additional competition on the routes served by the trunkline industry. Really, therefore, two kinds of policy considerations are in issue: (1) the declaration of the Aviation Act permitting approval of mergers only if not inconsistent with the public interest and unless productive of monopoly; (2) the Board's post-1955 policy of increasing route competition as a means of achieving greater balance within the industry and insuring maximum development of the domestic air transport system.

B. *The American-Eastern Merger*

The merger of Eastern Air Lines into American Airlines, agreed to by their respective boards of directors on January 23, 1962, would create a massive corporate entity, with assets of $950 million—greater than those of RCA or General Dynamics, or of such large railroads as the Chesapeake & Ohio and the Baltimore & Ohio. Within the airline industry itself a combined American-Eastern would become the largest carrier, regardless of the standard of comparison. In 1961 American accounted for 20% of all revenue passenger miles flown by the trunk airlines in domestic operations, Eastern for 13.5%. Together, therefore, they would represent a third of the total passenger traffic. In conjunction with last year's United-Capital merger (which made United the nation's biggest one airline), amalgamation of American and Eastern means that the two biggest airlines together would dominate about 60% of trunk airline traffic and that the three largest (including TWA) would account for about 75%. The result clearly would be a sizeable increase in the level of concentration, far more than offsetting in one step all of the Board's efforts over the last several years to achieve less concentration and greater industrial balance. Moreover, the likely effect of the proposed merger would be to trigger off a series of other consolidations, as the surviving carriers struggled (rationally or otherwise) to maintain relative position within the industry. Certainly if the Board swallows this proposed merger it will have immense difficulty in rejecting a number of other consolidations, most of which would involve aggregations of capital and passenger traffic of far less magnitude. Interestingly, it is precisely these kinds of considerations that led Judge Weinfeld to forbid a merger of Bethlehem Steel and Youngstown Sheet and Tube in 1958.[116] There the parties together possessed about 21% of total steel ingot capacity; merger promised to entrench Bethlehem in number two place in the industry and also to lead to further concentration, giving the top two firms nearly 50% of ingot capacity; as well, if this merger were tolerated, he reasoned, it would be likely to inspire other mergers to which it would be difficult to object. While the Bethlehem-Youngstown case was brought under section 7 of the Clayton Act, the kinds of competitive repercussions it was thought to present are directly relevant in evaluating the American-Eastern proposal.[117]

[116] United States v. Bethlehem Steel Corporation, 168 F. Supp. 576 (S.D.N.Y. 1958). And precisely these kinds of factors were also involved in the recent Brown Shoe decision, where the Supreme Court upheld a section 7 violation. Brown Shoe Co. v. U.S., 370 U.S. 294 (1962).

[117] Moreover, the CAB is charged with the responsibility of enforcing section 7 of the Clayton Act in respect to mergers within its jurisdiction. 15 U.S.C. § 21. Even though the effect of the Board's approval is to exempt the parties to a merger from the "antitrust laws,"

Laying aside the effect of the American-Eastern merger on overall industry concentration, the impact on routes where the two airlines are now in direct competition must be assessed. As a very general matter American operates from the northeastern part of the country (including such major points as New York, Boston, and Washington) southwest through Chicago, Cincinnati, and St. Louis to Dallas and the West Coast. Eastern operates mostly in a north-south direction, reaching Miami, Atlanta, New Orleans, and Houston from such northern points as New York, Pittsburgh, Detroit, Chicago, and St. Louis. Many of Eastern's routes are concentrated in the southeastern quadrant, blanketing the Carolinas, Georgia, Alabama, and Florida. Viewed in this manner merger between the two companies seems to threaten no loss in competition. But a closer look at the routes indicates several areas where they are in direct competition.

Most of their face-to-face competition comes in the northeastern area, between such cities as Boston, Providence, Hartford, New York, Philadelphia, and Washington. But the two also compete in service between points in that section and others in the central United States—such as New York-Louisville and Boston-St. Louis—and within the central region itself—such as Chicago-Indianapolis and Chicago-Cincinnati.

Table 9 arrays a number of the routes where the two airlines now compete beginning with those where they provide the only service (Houston-Cleveland), or virtually all of it (New York-Louisville), to those where they meet substantial competition from other airlines (Boston-Washington). As is evident, on at least a dozen routes American and Eastern provide the only competition; over another five American and Eastern together carry 90% or more of the passenger traffic.[118] Obviously in these cases merger will mean the elimination of all effective competition. While these routes vary greatly in the amount of traffic generated, as indicated in Table 9, it cannot be denied that acceptance of this merger means the acceptance of monopoly where competition (albeit duopolistic) now reigns.

Even over routes where American and Eastern presently encounter significant competition from other carriers, as between New York and Washington, they nevertheless frequently account for the biggest chunk of the traffic. While one frequently sees references to the large number of carriers authorized to serve various of the northeast routes, the fact remains that as to several of them American and Eastern are nevertheless dominant—as in the case of New York-Boston, New York-Washington, New York-Hartford, and Baltimore-New York. Here merger will mean not only conferring on one carrier an effective monopoly, but, perhaps even more important, the elimination of a substantial independent competitor from the market. The significance of this seems particularly striking insofar as service along the upper eastern seaboard is concerned, for it is here where, within only the last year, Eastern has shown particular imagination with its inauguration of an air-shuttle service. While it is

there remains a serious question whether the Board can disregard section 7 in reaching its decision. If it cannot, then section 7, which represents a greater hurdle than the monopoly proviso, must also be satisfied before any merger can be authorized. So far the issue has not been satisfactorily resolved.

[118] A more comprehensive listing of routes on which American and Eastern now compete is contained in exhibit BER-10. Exhibit AE-601 presents similar information.

TABLE 9. DIVISION OF PASSENGER TRAFFIC IN SELECTED MARKETS WHERE AMERICAN AND EASTERN COMPETE

Market	*Total Revenue Passenger Miles in Millions, 1960**	*Percentage of Traffic Carried by†*		
		American	*Eastern*	*Other*
Houston-Cleveland	6.5	71	29	
Louisville-Nashville	2.3	47	53	
San Antonio-Hartford	3.5	33‡	67‡	
Syracuse-Baltimore	0.8	35	65	
Syracuse-Louisville	0.8	47	53	
San Antonio-Philadelphia	9.5	31	69	
San Antonio-Providence	1.2	40	60	
Charleston-Chicago	3.2	50	46	4
New York-Louisville	40.0	32	63	5
Charleston, W. Va.-Washington	4.6	38	57	5
Hartford-Louisville	1.7	13‡	81‡	6‡
Chicago-Indianapolis	17.6	28	65	7
Hartford-New York	10.3	58	30	12
Boston-Louisville	6.6	17	71	12
New York-Providence	18.0	69	15	26
Philadelphia-Roanoke	1.5	50	25	25
New York-Boston	167.0	25	48	27
Hartford-Washington	10.0	7	65	28
Hartford-St. Louis	5.4	70	1	29
New York-Washington	149.0	27	43	30
Boston-St. Louis	22.0	62	8	30
Baltimore-New York	13.2	9	55	36
Houston-San Antonio	8.7	15	44	41
Nashville-San Antonio	2.1	40	15	45
New York-San Antonio	52.0	4	45	51
Chicago-Cincinnati	22.5	32	13	55
Washington-San Antonio	20.3	9	35	56
Boston-Washington	67.0	11	17	72

Sources: * CAB. Domestic Origin-Destination Survey of Airline Passenger Traffic, Summary Date (1961).

† CAB. Competition Among Domestic Air Carriers, 3d Quarter 1961, unless otherwise noted.

‡ Same as note "†," but for 2d Quarter 1961.

pleasant to think that this spirit might come to imbue American Airlines after the merger, it is more realistic to note that American has not chosen to follow Eastern's step, in fact has ridiculed it, and might very well kill it. As has been suggested earlier, there is distinct public advantage in preserving as many independent competitors as possible; better to retain American and Eastern as rivals in route-markets already highly concentrated rather than bless their marriage because some competition would remain. All of the evidence, therefore, points to the conclusion that this merger will eliminate significant actual and potential competition as well as create monopoly on a number of routes.

The full implications of the American-Eastern merger cannot be appreciated, however, solely by looking at those markets where they presently are in competition. It is necessary to assess the significance of the fact that their consolidation will bring together the second and fourth

largest domestic trunk airlines and hence permit integration of their systems in such a way as to create a powerful new force within the industry. In a sense this will increase the extent of competition (in areas of low traffic volume); but it is more likely to divert traffic away from the weaker lines and hence further imbalance the industry. The reason for this stems from an analogy to the Gestalt effect—the whole being greater than the sum of the parts. Though they do compete over many routes, these two carriers by and large cover different sections of the country and can move traffic from any given location to any other on their unified system via any of 30 gateway cities. What this can mean, vis-a-vis other carriers, was noted by the CAB in 1946 when it refused to permit American to acquire Mid-Continent Airlines, the latter operating north-south from Minneapolis-St. Paul to Texas and New Orleans. The Board admitted that there was little direct competition between the two; but it feared that American, because of the great breadth of its operations, could undesirably distort the competitive situation in respect to the acquired routes. The Board explained:

> [T]he wider the geographical scope of a carrier's operations in comparison with a particular rival, the greater the competitive advantage which it will enjoy through its control of traffic originating at or destined to points to which the other carrier does not have access. Because of this fact, the extension of a carrier's system may enable it to divert a substantial amount of traffic from a competing carrier without at the same time rendering a service more attuned to the public convenience and necessity.[119]

The way in which this can work is easily seen. Braniff Airways, for example, now carries a considerable volume of passengers to points on its system which originate at points served by Eastern Air Lines. In many cases American Airlines could destinate the passenger just as well as Braniff. But at the moment Braniff has an equal opportunity with American to secure this traffic. When the merger takes effect, however, it is reasonable to expect that most of this kind of business would be internally "captured" and routed entirely over the combined entity. The significance of this is apparent when it is noted that in January, 1962, alone, Braniff received revenues of about $1 million just for service it gave to points on its line, also served by American, that was originated by Eastern.[120] Many similar examples could be recited, but their lesson would be precisely the same: when two major airline systems are consolidated, the tendency is to deprive other transporters, equally capable of providing the service, of the opportunity. This would be true of freight traffic as well. On cargo now moved between California and points in the southeastern United States the Flying Tiger Line (an all-cargo domestic operator) now provides much of the service; but upon their merger it is anticipated that much of this business would be taken over by American-Eastern.[121]

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[119] 7 C.A.B. 365, 378-79 (1946).

[120] Exhibit BN-10. American seeks to rebut this fear by showing the number of passengers who could have completed their trip via American but did so via Braniff. Exhibit AE-1250. The point has some merit, but with the far greater range of coverage held by a combined American-Eastern it is rather obvious that Braniff has a far greater risk of loss, both relatively and absolutely.

[121] Exhibit FTL-1. In 1961 about 27% of the Flying Tiger Line's interlined freight was with Eastern; but since American is competitive with FTL over most of the latter's routes, the preponderance of this freight can be expected to move via American-Eastern.

The contemplated merger would also make possible new, through-service between many cities which presently require at least a single change of planes. This is a mixed blessing, offering some public advantage (though not as much as might at first appear) but raising the spectre of unjustifiable competition over routes which American Airlines itself would otherwise consider too limited in traffic to justify. To take the rosier side first, some 553 city-pairs could receive their first single carrier connecting service as a consequence of the American-Eastern merger.[122] Not all of these, of course, will actually receive this service for the simple reason that they develop far too little passenger volume. In fact, of the 553 city pairs, only 39 offer more than an average of one passenger per day in each direction. The following are among the more important points that would receive their first single-carrier authorization:

Detroit—Nashville
Cleveland—Montgomery
El Paso—Miami, New Orleans
Charlotte, N. C.—Tulsa, Oklahoma City, El Paso
Huntsville—Los Angeles, San Francisco
Los Angeles—Raleigh (and other Carolina points)
Phoenix—Atlanta, New Orleans, Mobile
Oklahoma City—various points in Florida
San Francisco—Atlanta, Raleigh

In short, after the merger, if the service is actually made available, a passenger could fly aboard the same plane from Detroit to Nashville (not necessarily nonstop), or the other points indicated, where a change of planes (and airlines) must now be made. There is undeniable public improvement in this possibility, though it deserves emphasis that the city-pairs which are in this category involve relatively few people (the largest, Detroit-Nashville, averages only 12 passengers a day in each direction).

Furthermore, the merger would also permit direct, through-plane service between a number of cities already receiving service from at least one other carrier. It is this possibility that presents the greatest danger—threatening to harm seriously a number of weaker airlines and to enhance the American-Eastern industry position. All of the markets so affected provide significant amounts of passenger traffic, but far below the volume generated on routes where American Airlines presently insists competition is unjustified. Here is a list of some of the city-pairs which American-Eastern could serve directly on a through-plane basis that already receive nonstop service from another airline:

Atlanta—Los Angeles, San Francisco
Miami—Los Angeles, San Francisco
Jacksonville/Orlando—Los Angeles, San Francisco
Birmingham—Los Angeles, San Francisco
Charlotte—Los Angeles, San Francisco
Caribbean (San Juan)—West Coast points
Detroit—Memphis
New Orleans—West Coast points

[122] For an indication of the kinds of new service the merger will permit, see exhibit BER-1 and the American-Eastern response to the CAB's Bureau of Carriers Information Request No. 20, p. 1.

In each case American-Eastern would be required to make one stop en route and in some situations this would require some deviation from the most direct path (this, though, would not exceed about 100 miles).[123] How important these modest restrictions would turn out to be cannot be accurately predicted; carriers required to stop en route competing against nonstop rivals usually are disadvantaged, but American, apparently because of the goodwill and customer loyalty it has established, seems able to do well in spite of such conditions. Indeed, if the merger is approved, American plans immediately to inaugurate jet service between most of the points indicated above—some evidence of its own confidence in denting the markets.

Where the merger is likely to have its strongest competitive repercussions is along the Southern Trancontinental Route, the subject of awards by the CAB in 1961.[124] At that time the Board chose National Airlines to provide a nonstop service from Miami to California (with authorization also to serve Houston and San Antonio) and granted Delta permission to fly nonstop from Atlanta to California. In doing so the Board deliberately preferred these weaker carriers to American, which had vigorously sought either or both of these certifications. In commenting on American's application the Board said:

> The fact of the matter is that the grant of American's application for an extension to Florida, coupled with its existing system, would give that carrier a southern transcontinental route. Obviously, the impact of this award to American would be such as to thwart the strengthening of Delta and National which was the objective of our awards to those carriers.[125]

Put more straightforwardly, little more than a year ago the CAB expressly chose weaker carriers to provide service on the southern transcontinental routes; it deliberately excluded American; yet if the pending American-Eastern merger is approved without restriction American will have gotten, through the back door, exactly what it was refused at the front. Actually it appears that one of the major reasons why American favors the merger with Eastern is the expectation that this will give it the right to provide through service across the entire southern tier of states.[126]

[123] This can have an impact in other areas and under other conditions as well. Consider the situation in respect to service between Washington and Minneapolis. Northwest, though authorized to fly nonstop between these points, actually operates only one such flight a day (it feels that traffic is too light to justify more than this). A combined American-Eastern could operate through-plane service between the two cities via Chicago and thus compete on almost an identical basis with Northwest, in spite of the fact the latter has a superficially stronger award. See exhibit NWA-A, pp. 5-6, NWA-136.

[124] Southern Transcontinental Service Case, 1A Av. L. Rep. ¶ 21,131 (1961).

[125] Southern Transcontinental Service Case—Supplemental Opinion and Order on Reconsideration, 1A Av. L. Rep. ¶ 21,171 (1961). Pertinent also is the decision of Oct. 30, 1961, in which the Board disapproved a lease agreement between American and Eastern calling for an interchange of equipment at Chicago that would permit through-plane service between Florida and California. The Board felt this arrangement would conflict with its Southern Transcontinental decision. Eastern Air Lines, Inc. and American Airlines, Inc.—Lease Agreement—Order Disapproving Agreement, 1A Av. L. Rep. ¶ 21,222 (1961).

[126] Recently the Court of Appeals for the District of Columbia set aside last year's CAB award of the Dallas-Florida segment to Eastern, on the ground that it was not supported by reasons and evidence that appear on the face of the record. Presumably the Board will again reach the same decision on remand. But changes in circumstances might lead to a different result, and conceivably the Board could thus prevent a merged American-Eastern from gaining a southern transcontinental route. Wall Street Journal, May 25, 1962, p. 6, col. 4.

The effect of the American-Eastern merger, therefore, would be to add a strong new carrier to routes which, just a year ago, were felt by the CAB to be best served individually by weaker trunklines. As one looks at the traffic data there is considerable evidence to support the Board's decision to confine through-carrier service along the southern transcontinental routes to a single carrier. By comparison with most of the more prominent markets in which competition was increased after 1955, the southern tier markets are noticeably thin. For example, in 1955 the Board opened up the Dallas-New York route to a second carrier; but this is a sizeable market, developing 168 million revenue passenger miles in 1960. By contrast none of the southern transcontinental routes generate this much traffic; here are some examples, with traffic for 1960 expressed in millions of passenger miles:

Houston—Los Angeles	38.0
Atlanta—Los Angeles	32.7
Atlanta—Dallas	15.0
Dallas—Los Angeles	77.4
Miami—Los Angeles	91.4

The two most heavily traversed routes thus produce only about half the traffic that moves between Dallas and New York; and of these two, one (Dallas-Los Angeles) is already competitive. Yet in each instance cited a merged American-Eastern could provide additional, through-plane service. Precisely what impact this would have is not easily determined. But the CAB's Bureau of Economic Regulation has estimated that the merger will divert $7.4 million from National Airlines and an additional $6.2 million from Delta, primarily as a result of service possibilities along the southern transcontinental routes.[127]

There are other ways in which the merger might permit the parties to expand their market position and exert their influence beyond what is indicated simply by their consolidation. Some of these are difficult to assess; their precise impact on other, smaller competitors is incalculable. A few can be recited for purposes of illustration. For one, there is little doubt that American possesses substantial good will and traveler acceptance that gives it an advantage over rivals, even where their service is comparable. A large part of this, of course, may merely be due to its far more extensive advertising and promotional efforts.[128] Moreover,

[127] Exhibits BER-5/6. The Bureau of Economic Regulation estimates that a combined American-Eastern would gain approximately $41 million in additional passenger revenue as a result of the merger. Of this amount $23 million would come from service in the southern transcontinental area and $18 million from other areas. Of the total amount roughly $17 million would represent diversion from other carriers—the larger portion from National and Delta due to their extensive operations along the southern transcontinental routes.

[128] During the year ended Sept. 30, 1961, American spent approximately $6.1 million on advertising, Eastern, an additional $5.5 million—in each instance more than any other airline except United-Capital. On an available seat mile allocation, however, American spent only about half as much as the smaller eight. Exhibit BER-25. While a combined American-Eastern may save up to $3.5 million in advertising outlays over the sum of their separate expenditures (exhibit AE-H-2), the other carriers are strongly of the view that the merged entity will have the merchandising upper hand. See exhibits CAL-16; DL-50 ("it is a generally accepted fact that the biggest carrier with the largest advertising budget and greatest exposure to the traveling public has the inherent ability to attract more passengers in any given market"), p. 2. The argument of the smaller companies comes down to saying that the bigger rival gets proportionately more "effect" for its dollar outlays. For other illustrations of this position, see Edwards, Conglomerate Bigness as a Source of Power, in National Bureau of Economic Research, Business Concentration and Price Policy (1955).

American and Eastern together account for some 66% of the cards outstanding under the Universal Air Travel Plan;[129] this tends to provide them with readier sales access to those business travelers who account for over 25% of passenger revenues collected through this credit system. In the larger cities, served by more than a single airport, the giant airline also would have a distinct advantage. In New York, for example, American and Eastern operate through all three of the city's terminals. This means that a passenger, arriving at one of the airports and required to change to another airline to finish his journey, more probably will select American for this completion leg than some other, smaller airline which also supplies the service but which operates from another airport. As an example: someone flying from a medium-size New England city to New York's La Guardia field, for onward movement to Detroit, will find that Northwest Airlines operates only from Idlewild and Newark. American, however, which likewise provides service between New York and Detroit, operates from all three fields. The typical passenger is quite likely, therefore, to select American over Northwest.[130] And the merger will insulate this process, offering more service to more points.

The potential advantage of American-Eastern is perhaps most readily seen through an examination of its equipment pool. By the end of this year, for example, American-Eastern would have about 31% of the country's jet fleet. In conjunction with the seasonality of their operations—American with peak demand in the summer, Eastern in the winter— rather clearly the merged company will be in a position to increase substantially the amount of service already being given on routes which they serve. In the winter, for instance, Eastern could literally flood the New York-Miami route with jet flights—far in excess of the number that its two competitors could offer.[131] This would give it a marked advantage, for it is well-established that the carrier offering the larger number of flights typically becomes the market leader.[132] In fact, this is already true on the New York-Miami run, ostensibly because of Eastern's more frequent service. This would be greatly accentuated in the event of merger with American. To listen to the pleas of the two airlines, however, one would think that in each other's off-season, the unnecessary flight equipment would be put in storage; this they admit is not contemplated, which implies that they will use the equipment to provide stepped-up service over

[129] UATP contracts are entered into between individual airlines and contracting concerns. Though the cards supplied can be used on any participating carrier, all transactions are handled by the original contracting airline. American reportedly makes duplicates of bills it renders and turns them over to its sales personnel; aggressively exploited this can be of advantage in offering assistance in reservations, planning or adjusting flight departure times, etc. The other airlines feel that American, in particular, gains many benefits through its dominant role in the UATP. See exhibits DL-50/51; BER-26; BN-A, BN-6/7.

[130] See exhibits NWA-130 and NWA-A, pp. 6-7. The gargantuan size of new terminals also tends to give the airline providing through-plane service an advantage over those which provide an interchange service requiring a change of planes. At Chicago's O'Hare field, for example, a passenger transferring from American to Northwest must proceed nearly ⅔ of a mile; accordingly the minimum connecting time differential between a scheduled arrival and departure at O'Hare is now 50 minutes. To the passenger who can do so, therefore, it is faster to go via the through-service airline; this could reduce over-all flight time by at least 30 minutes.

[131] And Eastern is known for taking just this kind of action. In 1959, for example, it distributed a memorandum, marked "confidential," which outlined "a positive offensive action of smothering the competition with schedules." Exhibit DL-36D, p. 1.

[132] The close correlation between the number of flights offered and the share of traffic carried is shown in exhibits BER-11/15.

higher-volume routes. The impact of this on the weaker carriers is obvious; either they would be forced to acquire additional equipment, at a higher cost than American-Eastern pay in the capital market,[133] and with a consequent rise in capacity (something hardly to be encouraged), or have their share of the relevant markets appreciably reduced. This ability to shift a massive, diversified equipment fleet from area to area indeed appears to be one of the merged company's greatest sources of strength. Its exertion can only reasonably be expected to enlarge the consolidated airline's place in the market beyond that which merger alone would confer.

Mention of the internal advantages of a large equipment pool, however, raises a crucial question: might not a merged American-Eastern, because of its greater size, not represent a substantial gain in efficiency, with the lower costs inuring in some way to public advantage. This is simply a variant of the old theme: aren't the biggest companies the more efficient? The answer is no, whether it be steel or airlines. Those who have looked closely at the problem conclude that airline efficiency correlates, not with the size of the firm, but with exogenous factors, particularly the density of the route and the average length of haul. The Koontz[134] and Wheatcroft[135] studies have found few, if any, economies of scale beyond the level attained by the medium or medium-small companies. Moreover, beyond the middle-size range significant diseconomies appear to set in. Thus in 1960 TWA and American Airlines ranked, respectively, first and second in average length of hop (reflecting their generally longer flights), and third and first in passenger load factor; still they held only the fifth and seventh places in terms of total operating expense per available ton mile.[136] It is indeed a mistake to think that size and efficiency are directly related; they are not. Other factors are more important, and at some point size may become a disadvantage—in terms of efficiency although it may be useful to the possessor. A merger of American and Eastern would unite already large carriers; in some respects it would permit fuller exploitation of existing traffic; but more generally it would link together carriers with noncompetitive routes and hence contribute little to more favorable operating circumstances. In short, it promises little in the way of increased operating efficiency.

American and Eastern claim that their merger will permit other kinds of economies which make their consolidation meritorious. Merger, they insist, will permit the elimination of duplicate terminal and ticket facilities, allow consolidation of hangars and repair centers, reduce capital requirements, etc. The table below summarizes the claimed pretax savings:

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[133] As of December 31, 1961, the average interest cost on outstanding debt of the biggest three airlines (excluding TWA) was 4.52%; for the seven smaller airlines, 5.41%. Exhibit DL-32, p. 1. Eastern has been able to borrow from major New York banks at attractive interest rates. Presently it has outstanding $80 million in such bank loans. Of this, $60 million is due 1963-65, bearing interest of ½ of 1% above the prime commercial rate; $20 million is due in 1964, bearing interest of ¼ of 1% above the prime rate. Eastern Proxy Statement, March 12, 1962, p. 37.

[134] Koontz, *Domestic Air Line Self-Sufficiency: A Problem of Route Structure*, 42 Am. Econ. Rev. 103 (1952). He found that only four of the airlines, at the time of his study, were at a serious cost disadvantage on account of their size. Of these, two have since disappeared (Colonial and Inland) and one, Northeast, in spite of CAB attempts at resuscitation, is bankrupt. The other, Continental, has been substantially improved in recent years through new long-haul awards.

[135] Wheatcroft, The Economics of European Air Transport, ch. III (1956).

[136] Exhibit JI-1, p. 34.

TABLE 10. AMERICAN-EASTERN, CLAIMED SAVINGS AS A RESULT OF MERGER

Item	*Amount of Savings (in thousands)* 1962 *level*	1964 *level*
Depreciation		$ 8,269
Interest		5,796
Advertising	$ 3,000	3,500
Electronic Data Processing Requirements	906	2,792
Flying Hours Saved	13,037	14,379
Rentals and Utilities	3,586	7,862
Management Overhead, Outside Services, and Other Common Station Savings	11,000	12,100
	$31,259	$54,698

Source: Joint Response to Bureau of Carriers Digest No. 32, second rev., p. 1

Unquestionably these economies are impressive, if realized. How realistic they are remains open to serious doubt, however. Both parties currently use ticket and other facilities that are held under long-term lease—as in the case of terminal and hangar leases at O'Hare Field in Chicago, for example, that do not expire until 1998.[137] In such a case it is doubtful if any real savings can be affected. There are other similar examples, but all suggest that it will be a good deal more difficult to achieve as many savings as are claimed. Moreover, some of the savings were in reach before the merger was agreed to. For instance, of the $13 million reduction in flying costs that is forecast, more than 92% comes from a reduction of 39,003 ramp hours in the use of Eastern's Constellation equipment. But Delta Airlines, in its intervening argument against the merger, contends that of Eastern's 76,000 ramp hours on this type of equipment in 1961, 60,000 could have been eliminated without merger simply through more intensive equipment utilization.[138] While this counter-claim itself is open to question, it raises some considerable doubt as to the extent of the economies that will actually be achieved as a result of merger.

In some respects, however, it is rather amazing how few the economies will be. Eastern and American state they now have firm contracts calling for the delivery of 65 Boeing three-engine jet 727 transports. Merger will permit this number to be cut, but by only six in number, rather modest indeed.[139] This evidences either an unspoken belief by the parties in a rise in passenger traffic over the near term or the small amount of benefit that the merger will actually bring about.

But to the extent the merger does represent possible dollar savings, one is struck by the great extent to which these economies could be realized *without outright consolidation*. Where the two airlines presently operate, e.g., separate ticket offices in a given city, it does not require merger of their corporations to achieve joint use of common facilities. In fact, already Eastern and American share a ticket office in the Statler Hotel in Dallas. There are probably similar examples elsewhere, and there is no reason why this simple arrangement could not be extended widely.

[137] Eastern Proxy Statement, March 12, 1962, pp. 19, 23. There are other similar illustrations.
[138] Exhibit DL-37D, p. 1.
[139] Aviation Week, May 28, 1962, p. 41.

American and Eastern will combine their hangar requirements at Dallas in the event of merger; but this could be done anyway. And in fact why could this sort of practice not encompass several airlines? Recently a number of airlines announced they had created a spare parts pool, which offers savings of over $2 million annually. This could readily be extended to hangars, repair facilities, ground equipment (such as tractors, loading devices, etc.), and even perhaps to terminal check-in and processing operations. One indeed wonders why Eastern Air Lines requires a $14 million passenger terminal of its own at Idlewild, and American another valued at $21 million. It does not require clairvoyance to suggest the wisdom and practicability of having joint terminals, akin to the union stations operated by the railroads in major cities. After all, a man and woman can economize by sharing the expenses of driving to work without getting married.

C. *Summary*

All factors considered, and admittedly they do not all point in the same direction, the American-Eastern merger has little to commend it and much to recommend its rejection. Its consummation would significantly increase the overall level of concentration within the airline industry, a combined American-Eastern accounting for at least a third of total passenger traffic. Within a number of markets the competitive effect would be even more severe. Between several cities American and Eastern now provide the only service; merger would clearly mean monopoly in these cases. Over still other routes, where one or more other carriers are in competition, American-Eastern would clearly be the dominant airline, carrying more than two-thirds of the traffic in many instances. Moreover, due to the advantages possessed by the merged entity, particularly the ability to shift a massive, diversified equipment fleet from route to route, the long-run result would probably be to increase American-Eastern's share of the market at the expense of the industry's smaller airlines. Consequently, their consolidation would run counter to the Board's past decisions dealing with mergers (particularly as reflected in the *United-Western* and *American-Mid-Continent* acquisition cases) as well as to its recent policy of increasing competition within the industry.

It is true, however, that while the contemplated merger would kill some competition, in some areas it would increase the degree of competition. While this generally is a desirable quality, it is important to note that the markets affected in this case—largely lying within the southern tier states—are predominantly of low traffic yield. Only a year ago the CAB determined they were too small to support two competitive services and acted deliberately so as to prevent American from gaining a southern transcontinental route. It bears re-emphasis that American Airlines has argued with particular vehemence that the cause of recently depressed airline earnings lies in excessive competition. Yet the very markets which American suggests are unduly competitive generate far more traffic than the bulk of the markets where the American-Eastern merger would mean the addition of a particularly strong competitor. Moreover, although American insists that excessive competition is primarily responsible for recent airline financial troubles (a matter disputed earlier), its merger with Eastern goes only a very short distance in alleviating the condition.

For the sake of curtailing competition between a number of high-density markets in the upper Atlantic seaboard area and a few elsewhere the merger would bring together two large carriers that generally are not in direct competition with one another. Thus, even assuming for the sake of argument that the American argument is valid, the contemplated merger does not represent its concrete application. American indeed seems to have fallen between two stools. It can't have it both ways; nor, for that matter, can the CAB.

Of the substantial dollar savings claimed by the parties to the American-Eastern merger (and there is some considerable doubt whether they can be completely realized) the great preponderance can be achieved without outright consolidation. To combine ticket sales offices, or hangars, or terminal loading equipment, or spare parts, or most anything—including flight equipment itself[140]—a merger is unnecessary. What economies the American-Eastern merger holds out thus can largely be accomplished *without merger*. Accordingly, as long as merger means, as it does here, the loss in some competition and the risk that the level of concentration will be still further increased, it is difficult to come to any other conclusion than that the planned consolidation is, to paraphrase the words of the statute, inconsistent with the public interest.

IV. Conclusion

Whenever an industry is beset by financial troubles a search begins for the devil. Commonly "excessive" competition fills the bill and mergers provide the means of exhortation. This is no less true of the airlines—their officials and regulators—than of other industries. To those seeking a simple, quick "solution" corporate consolidation indeed represents a temptation difficult to resist. Closer analysis suggests, however, that undue competition is not the culprit, that more fundamental, more elusive factors provide the explanation and that a cure for the airlines' plight will require more reflection, more information and above all more imagination than has heretofore been displayed either by the carriers or their government overseers. Under such conditions it would be the gravest of errors to think that mergers will, as a general matter, provide any lasting answer. Their approval, as the pending American-Eastern amalgamation well demonstrates, would lessen competition and threaten to increase the prevailing degree of concentration without offering any significant public benefits that could not otherwise be achieved.

Although the domestic trunk airline industry has suffered notable financial troubles in recent years (though less serious than commonly portrayed), the available evidence, fairly interpreted, suggests strongly that the near future will record substantial improvements. So far this year passenger traffic has been increasing at a rate indicating about a 10% rise in revenue miles compared with 1961. Although the load factor continues to fall, the greater operating efficiency of the jet along with the slackened pace of equipment acquisitions indicates that the current traffic

[140] There are many examples of equipment interchange and lease arrangements. See, *e.g.*, New York-Houston Interchange Case, 16 C.A.B. 602 (1952). Generally, Winkelhake, *Interchange Service Among the Airlines of the United States*, 22 J. Air L. & Com. 1 (1955). Interestingly the Board itself, at an early date, recognized that an interchange of equipment might be acceptable where an outright consolidation would not. Compare United-Western acquisition, *supra* note 106, with United-Western interchange, *supra* note 115.

increases will lead to substantial profits for the industry as a whole during the current calendar year. And as long as the economy continues its upward movement, there is excellent reason to believe that 1963 will be an even better year. Looking back, if there is a single leading explanation for the industry's recent decline in earnings it is the failure of passenger traffic to grow since 1959 at the rate recorded in prior years. This, in turn, is related in part to the 1960-1961 recession and in part to the sharp fare hikes which have been placed in effect since 1958 (up by roughly 25% during the past four years). If the airlines' generally overzealous purchases of jet equipment is also considered, it is fair to say that much of the financial problem stems from their own miscalculations.

To place the blame for the decline in earnings on "excessive" competition, as many of the leading airline and regulatory officials are doing, hence seems particularly inappropriate. No doubt the increased competition stemming from the CAB's route awards of the last seven years has accentuated the problem. But it has not been an efficient cause. Recession, heavy investment in jet aircraft coupled with the high costs of introduction, a general decline in traffic at least partly the result of fare hikes, and a miscellany of other factors (e.g., work stoppages due to labor disputes) can far more reasonably be identified as the explanations for slackened airline earnings. And, despite a lack of comment on the point from within the industry, some of these forces are not beyond the influence of the carriers. Reliable evidence indicates that traffic growth correlates with airline fares and that raising fares only curtails the traffic essential to financial success. Thus economic wisdom here clearly calls for markedly lower fares capable of attracting the attention of the 80% or more of the American people who have never traveled aboard a commercial airliner. This seems to be the proper next step for industry action, with the Continental proposal of an economy rate 25% below the coach fare a good point of origin.

All things considered, mergers offer little of real benefit. While in some ways they would inhibit competition, this does not appear to be the cause of the airline industry's troubles. To sanction mergers in this context therefore, would be primarily to deprive the public of a quality that offers substantial advantages. Although rivalry here is of a limited variety, nevertheless there are compelling arguments for preserving as large as possible a number of independent competitors. Not only has experience shown this as leading to a wide range of important service and equipment benefits, but it has contributed to price advantages as well (Eastern's air-shuttle and air-bus innovations are examples, as are some of the novel fare offers of National). The creation of monopoly and the substantial lessening of competition is too big a price to pay for the achievement of so little.[141]

But to discount heavily the utility of mergers as a "solution" to the airlines' financial difficulties (to the extent those difficulties may not be

[141] Among the other writers who share this general conclusion are Healy, *The Merger Movement in Transportation*, 52 Am. Econ. Rev. 436 (Supp. May 1962); Maclay and Burt, *Entry of New Carriers Into Domestic Trunkline Air Transportation*, 22 J. Air L. & Com. 131 (1955); Keyes, *A Reconsideration of Federal Control of Entry Into Air Transportation*, 22 J. Air L. & Com. 192 (1955). But there are those who are concerned that the prevailing degree of competition in the industry may be unwise and unwarranted. See Frederick, Commercial Air Transportation 180-181, 195-202 (4th ed. 1955); Gill and Bates, *supra* note 64, at p. 631; Koontz, *supra* note 134, at 123-24.

only temporary), is not to say that certain kinds of action should not be taken immediately to improve the industry's financial prospects. First, the airlines should begin immediately to experiment with markedly lower fares—sufficiently far below the prevailing levels and kept in force for a period long enough to permit reasoned assessment of their market effect. The CAB should encourage this action and not be disturbed if the fares charged do not cover fully-allocated costs; it can usually be presumed that the airlines will not provide service at rates below the incremental operating expenses incurred.[142] It bears emphasis too, that such fare experiments should be conducted before a serious consideration is given to the curtailment of competition (whether via merger or otherwise), not after, as Chairman Alan Boyd recently implied.

Second, the airlines, prompted by the CAB, should immediately seek out new ways of reducing costs through joint facility operations. It continues to make little sense for the various airlines, individually, to operate ticket offices, maintain hangars, and so forth, when these can be easily shared. This seems particularly true in the case of functions less "visible" to the public. One recent step involved the pooling of spare parts. That could be extended to hangars, repair facilities, and other behind-the-scenes operations. Joint use of electronic data processing equipment for reservations and related purposes is clearly feasible; indeed it appears that Eastern's EDP facilities are more than ample to take care of both its own and American's needs as well. Interline leasing of flight equipment already is common; the principle deserves wider appreciation. Unquestionably there can be a large reduction in overall airline costs without the very substantial loss in competition that consolidations of the various companies would inevitably entail.

Third, the CAB should immediately undertake a study to determine how much the trunk airlines are losing through their operation of service along various low-density routes. Indications are that these losses are substantial and hence, if reduced, might ease the airlines' economic situation considerably.[143] Northeast Airlines, for example, contends that if it is allowed to abandon service to seven small New England airports it can save from $1 million to $1.5 million a year.[144] There are similar indications contained in the efforts of other airlines to give up service to selected low-volume points; American Airlines is presently seeking to suspend its operations at such places as Akron, Ohio; Douglas, Arizona; Midland/Odessa, Texas; Joplin and Springfield, Missouri; and Peoria, Illinois.[145]

[142] The more enlightened airline officials know full well that if additional traffic provides sufficient revenue to cover the out-of-pocket expenses incurred, it can be worthwhile—contributing to the payment of diverse overhead charges. The CAB, however, seems intent on requiring a given service to cover all costs. See *supra* note 98. This unwisely inhibits the very kind of promotional pricing that the Board and others advocate. See, *e.g.*, the Report of Project Horizon, *supra* note 15, at 190-95.

[143] In 1956 the Air Transport Association acknowledged that many points served by the trunk airlines are truly unproductive and, absent enrichment from other routes, would require subsidy. Finding that to avoid subsidy a given location must enplane at least 57 passengers per day (which seems rather high), the ATA concluded, for example, that one-third of the points served by American in the last half of 1955 represented losses. For the other airlines the proportion was even higher: 61% for Braniff, 53% for Delta, 43% for TWA and United. Hearings Before the House Antitrust Subcommittee, Monopoly Problems in the Regulated Industries: Airlines, 84th Cong., 2d Sess. (1956), vol. 3, pp. 1653-55.

[144] Wall Street Journal, May 23, 1962, p. 13, col. 2.

[145] Joint Response to BC Information Request No. 31, p. 22.

Some suggest that one of the major reasons for Eastern Air Line's troubles has been its unwillingness to abandon a large number of points that generate revenue far below the probable related costs. In fact, on occasion Eastern has remained in competition with subsidized local-service carriers.[146] At this juncture, however, no one is certain of the magnitude of the losses involved in trunk line operations to such small-volume locations; this should be determined.

It would seem only wise to permit the trunk airlines to abandon service with far greater freedom than they have at present. To force the trunk carriers to provide service in cases where local service airlines would be subsidized is absurd. This only means that the richer routes (and the travelers involved) must provide sufficient profits from which the cost of unproductive service can be recouped. As well, this makes it more difficult to sustain competition in the bigger markets.[147] Let it be admitted that service abandonments by the trunk lines means that many communities would have to depend on feeder carriers for their air service and that subsidy payments might have to be increased.[148] This should not be alarming; economic common-sense dictates that if markets do not provide sufficient revenue to cover the costs of a given service, they can rationally only be served (and that appears to be the Congressional demand) at a price. And better that price be direct subsidy than that it be a hidden subsidy drained from operations in wealthier markets.

Fourth, the CAB should also begin a careful review of the various routes on which it has made additional competitive awards during the last seven years with a view to determining the adequacy of the traffic involved to sustain the existing degree of competition. Necessarily this would entail a specification of the Board's objectives in encouraging competition and a consideration of the effect of the increased traffic that most of the routes will generate this year. Such a review could give the Board a useful opportunity to consider the consistency of its actions in recent years. As was indicated in part II of this article, the CAB failed to take this kind of action at the time it made the various awards. The result is that there is little meaningful correlation between the number of airlines authorized to serve a given route and the level of traffic involved. Many incongruities are apparent.[149] Some routes with low traffic volume have been granted two unrestricted authorizations; others with even heavier traffic remain monopolized. Two carriers each serve St. Louis-Miami and New York-Dallas; yet in 1960 the former generated only about 25% of the revenue passenger miles of the latter. It would thus seem either that there should be more competition in some markets or less in others. At some point the Board should take its stand, publicly and explicitly spelling out its criteria. But until it conducts an inquiry of this type, in conjunction with a study of

[146] Some 73% of the stations served by Eastern that produced passenger revenue of less than $1 million in 1961 were acquired subsequent to the original grandfather grants. Exhibit NAL-304. However, in 1961 Eastern disposed of its local-service type routes in upstate New York to Mohawk Airlines, a feeder carrier. (These routes had been acquired in 1956 by Eastern when it purchased Colonial Airlines.) Eastern-Mohawk Transfer Case, 1A Av. L. Rep. ¶ 21,200 (1961).

[147] See Richmond, *supra* note 64, at 253-56.

[148] Not necessarily, though. In calculating subsidy payments for local-service carriers the CAB now uses a so-called class rate formula which has the effect of submerging the results of individual station operations in overall system operations. See Local Service Class Subsidy Rate Investigation, 1A Av. L. Rep. ¶ 21,134 (1961).

[149] This matter is considered in detail by Richmond, *supra* note 64, ch. IX-X.

the matter of internal subsidization (outlined above) and its relationship to the question of trunk airline earnings, the Board cannot make intelligent decisions in respect to the tolerable level of competition. Even worse, lacking essential information and without a comprehensive policy, the Board might grasp at mergers as a way of easing the industry's difficulties. This would be a grievous error, for airline consolidations generally, that of American and Eastern in particular, promise to contribute little to the resolution of the industry's basic economic problems, yet are sure to deny the public the substantial advantages of competition.

PROBLEMS IN EXPEDITION AND DISPOSITION OF LARGE ADMINISTRATIVE PROCEEDINGS AT THE CIVIL AERONAUTICS BOARD

By Edward T. Stodola†

I. Appraisal of the Problem

ASSUMING that the present formal judicial procedures in the disposition of major administrative proceedings are a sound and necessary system, is the time consumed in litigating and deciding the so-called big regulatory cases at the Civil Aeronautics Board (CAB) unreasonably long? It is no doubt safe to say that no serious student of the administrative process is satisfied with the time it now takes to reach final decision in the so-called big cases in administrative proceedings. Indeed, among the recent attacks on the administrative process, none have been more stringent than the criticisms directed at the time consumed in the disposition of large regulatory proceedings.

Though the expressions "delay," "inordinate delay" and "undue delay" are almost uniformly associated with the long intervals between the beginning and the end of large administrative proceedings, these descriptions are not in all instances accurate. The expressions are often applied to proceedings which are necessarily time consuming. The word "delay" implies "putting off" or "slowing down." Cases before regulatory tribunals may take a long time in spite of efficient and expeditious management and in this respect they are no different from cases before the courts. Many of them are just plain big, and as a result they take a lot of time.

It would not be difficult to cite numerous run-of-the-mine cases in each of the several larger federal administrative agencies, including the CAB, the disposition of which has been unconscionably slow. However, it has most often been the big, the complex, and the atypical proceedings which come to public notice and which draw the ire of legislators, the bench, the bar, and the students of administrative law. This is not to say that the censure visited upon the regulatory tribunals in recent years for the time taken in reaching final decisions in major cases has been undeserved, or that the constant recent prodding of the administrative agencies by congressional committees and by others has failed to help in the expedition of many of the large proceedings. On the contrary, much has been accomplished by recent examinations of the shortcomings of the administrative process and there are in the offing even greater improvements in administrative procedures. But it may be wise now to take measure of what has been done and to assess the prospects of further improvements lest a number of radical reforms for complete change in the administrative process currently pressing for acceptance create more problems than we now have and

† Hearing Examiner, Civil Aeronautics Board. Educated at the University of Wisconsin School of Economics, Stanford University and the University of Wisconsin Law School, Mr. Stodola has served with the federal government since 1941. He is a member of the Wisconsin Bar. The analysis and conclusions set forth in these comments are those of their author. They are not to be taken as an expression of the views of any agency of the United States Government.

establish procedures which could be much worse than the present system.

These comments are not primarily concerned with the difficult and volatile question of whether the integration of executive, legislative, and judicial functions within independent federal regulatory commissions is responsible for such deficiences in the administrative process as may account for the delays in the disposition of their judicial business. Nor is this paper primarily concerned with recent proposals whereby the planning and policy functions of such agencies would be transferred to the Executive Department, their adjudicatory activities to an Administrative Court, and their prosecuting functions to the Department of Justice or some other executive department. For obvious reasons, the latter proposals pose monumental problems. Aside from the mass of complex substantive law which has been developed by the various federal administrative tribunals in a multitude of fields, there has developed since the establishment of the Interstate Commerce Commission in 1887 a whole system of stable legislation and case law in the very important areas of agency powers and procedures and court review of administrative actions. The administrative process has been surrounded by judicial safeguards and made fair and workable. Most of the fears of arbitrary action and other procedural abuses which came from its early critics have thus been put to rest.

Except to note that much of the agitation to truncate the regulatory tribunals and to redistribute their functions has its roots in the failure of those tribunals to do more to simplify and to accelerate their judicial processess, no effort will be made here to add to the considerable volume of literature already available on the broad problem of whether the administrative concept is the best answer to the complex economic regulatory problems of our time.[1] These comments are likewise not concerned with the extent to which numerous *ex parte* communications to regulatory agencies from either public officials or private citizens often burden the agency and its staff and thereby slow up the disposition of its proceedings.[2] Moreover, the regulatory tribunals are under the policy direc-

[1] For an extreme view of the current shortcomings of the administrative process, particularly as related to the Civil Aeronautics Board, see Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 Yale L.J. 932 (1960). Mr. Hector's views are contained in the now celebrated Hector Memorandum, as submitted to the President of the United States on Sept. 10, 1959, upon Mr. Hector's resignation as a Member of the Civil Aeronautics Board after nearly two years of service. On March 29, 1960, the Civil Aeronautics Board submitted to the House Committee on Legislative Oversight a document entitled *Comments of the Civil Aeronautics Board on the Hector Memorandum to the President* consisting of two memoranda: *Comments on Hector Memorandum* (the Board's analysis of the memorandum) and *Analysis and Evaluation of the Hector Memorandum to the President* (a CAB staff analysis of the memorandum). Among other excellent literature on the problems raised by Mr. Hector, see Auerbach, *Should Administrative Agencies Perform Adjudicatory Functions?*, 1959 Wis. L. Rev. 95; Auerbach, *Some Thoughts on the Hector Memorandum*, 1960 Wis. L. Rev. 183; Friendly, *A Look at the Federal Administrative Agencies*, 60 Col. L. Rev. 429 (1960); Davis, *Dueprocessitis in the Atomic Energy Commission*, 47 A.B.A.J. 782 (1961); and, Bernstein, Regulating Business by Independent Commission (1955).

[2] Such communications are not necessarily improper since, for the most part, they relate to matters of procedural schedules or routinely transmit material to the agency without comment and as a matter of course are placed in the agency's public correspondence file for all to see. Nevertheless, the receipt, fling, and answering or acknowledgement of such communications are time consuming for the agency and its staff. Thus, a recent major new route proceeding before the Civil Aeronautics Board, styled the Great Lakes-Southeast Service Case, Docket 2396, shows a total of 507 separate communications to the Board or its staff in the public correspondence file of that docket. Other new route proceedings before the Board are similarly involved with inquiries from the Congress, from state and local officials, from municipalities and their chambers or associations of commerce, and from numerous private citizens. It is not unusual for the large new route proceedings to show from 100 to 200 such inquiries and comments, many of which

tion of the Congress of the United States, and the agencies and their staffs properly and unavoidably spent a great deal of their time appearing and testifying before congressional committees on matters of appropriations, conformity with existing legislative mandates, proposed legislation, and related subjects. Further, the ambivalent nature of an administrative agency such as the CAB, which has promotional as well as regulatory functions with respect to civil aviation, makes it necessary for the Board and its staff to take time to meet not only with congressional committees but with industry groups, state and municipal officials, airport authorities, and representatives of the general public.[3] These factors are necessarily part of the whole picture in any fair assessment of the time consumed in the disposition of proceedings before an agency such as the CAB.

A few more preliminary observations need be made before proceeding with the discussion as to what has been accomplished in expediting large cases at the CAB and what is hoped to be accomplished in this regard in the future. The large proceeding at the Board is highly important. A major licensing case before the Board can have a momentous effect on both private and public interests. The private interests of course encompass the air carriers as well as individual and corporate users of air travel. The public interest is no doubt a sum total of all interests; but it is primarily and peculiarly the concern of the community at local, state, and federal levels as distinguished from that of individual persons or businesses.

To illustrate, the *Southern Transcontinental Service Case*,[4] recently decided by the Board, involved potential revenues of approximately $150 million annually to the successful carriers in that proceeding, and it affected the air travel needs of every major city in the southern continental tier of states and the residents thereof. Such a large proceeding is necessarily difficult to organize; it usually takes a long time to hear; its record invariably takes an even longer time to analyze; and it is cumbersome precisely because it affects so many vital interests. An enormous amount of time must be spent by members of the agency, its staff, attorneys for the government, counsel for the affected air carriers, and attorneys for the cities and their chambers of commerce. While this is hardly time wasted, the large administrative proceeding always presents a challenge to reduce unusual time and heavy costs incurred in the preparation and in the actual trial of the case. Countless documents and exhibits of various kinds must be organized and collected. Witnesses must be examined and cross-examined on lengthy and often highly technical statistical data. Proposed findings and conclusions of law must be prepared. The examiner's initial decision must be written, oral argument must be heard by the agency, and its final decision made ready. It is the sheer complexity and importance of the large administrative proceeding which on occasion makes the interested litigant and the affected public wonder whether or not the trier of the case and the agency in command

are answered or acknowledged by the Board or members of its staff. Of course, to the extent such *ex parte* communications are inspired by interested litigants, such efforts not only add to the prolixity of the correspondence sections of the dockets in new route cases but constitute clear violations of professional standards of conduct in adjudicatory proceedings.

[3] For the distinctions inherent in the ambivalent nature of regulatory tribunals see *Trial by Agency*, Virginia Law Review Association, published lectures of Judge E. Barrett Pettyman given at the Virginia Law School in March, 1959, p. 9.

[4] Docket 7984, Initial Decision served June 20, 1960; CAB Orders E-16500 and E-16860, served March 13, 1961, and May 26, 1961, respectively.

of it have really spent *enough time* in organizing and making disposition of a record which means so much to so many people.

It must further be noted that federal administrative agencies have been and continue to be quite sensitive to the conflict between the demand for disposition of cases through expedited procedures and the observance of "judicial standards" in regulatory proceedings as described by Mr. Justice Hughes in the case of *Morgan v. United States.*[5] Rather than risk procedural error on judicial review, the agencies often provide more than adequate due process.

II. Court and Agency Efforts at Expedition

Substantial progress has been made in recent years in planning and organizing the trial and disposition of large and complex administrative proceedings. The advent of the Federal Rules of Civil Procedure in the late thirties paved the way in the courts of law for many of the techniques which have helped the administrative agencies in handling the big case. Without setting forth in detail the long, unspectacular but very fruitful history of efforts of individual judges and various committees to master the solution to organization, trial, and disposition of the big case in courts of law, particularly in the antitrust and patent fields, it is notable that the federal judiciary has hammered out various expediting techniques. These include use of pre-trial conferences, simplification and clarification of issuse, use and control of discovery, handling and limitation of proof, use of trial briefs, plan of trial, and numerous related procedures which have become the dependable bedrock in handling protracted proceedings in the federal courts. These procedural remedies had their first comprehensive compilation in the labors of a Committee of the Judicial Conference of the United States, appointed by the Chief Justice of the United States Supreme Court in 1949, and in the 1951 Report of the Judicial Conference of the United States, commonly known as the Prettyman Report.[6] Assisting the Judicial Conference was the Advisory Committee on Administrative Procedure, also appointed by the Chief Justice, which made recommendations with respect to protracted administrative proceedings.[7]

Close collaboration between the bench and bar brought application of the remedial proposals of the Prettyman Report of 1951 to numerous actual cases. Of course, many individual and group efforts were involved in the implementation of those remedies. Among others, the Section of Antitrust Law of the American Bar Association reported its views and experience.[8] These various efforts culminated in the Judicial Conference

[5] 304 U.S. 1, 19 (1938).

[6] Report of the Judicial Conference of the United States on Procedure in Antitrust and Other Protracted Cases, Sept. 26, 1951, 13 F.R.D. 62. See, McAllister, *The Judicial Conference Report on the "Big Case": Procedural Problems of Protracted Litigation,* 38 A.B.A.J. 289 (1952).

[7] Report of the Advisory Committee on Procedure before Administrative Agencies, submitted to the Judicial Conference on March 30, 1951.

[8] Report of the Committee on Practice and Procedure in the Trial of Antitrust Cases, Section of Antitrust Law, Am. Bar Ass'n., May 1, 1954. This Report analyzed the recommendations of the Judicial Conference of 1951 and provided valuable information on the trial of numerous antitrust cases. See also, Proceedings of the Seminar on Protracted Cases, New York University Law Center, Aug. 26-30, 1957, 21 F.R.D. 395; and "Streamlining the Big Case", Report of the Special Committee of the Section of Antitrust Law of the Am. Bar Ass'n., Sept. 15, 1958, 13 A.B.A. Antitrust Section Reports 183.

Handbook on Procedures for the Trial of Protracted Cases. This Handbook is the Report of the Judicial Conference Study Group on Procedure in Protracted Litigation, under the Chairmanship of Judge Alfred P. Murrah, as adopted by the Judicial Conference of the United States in March 1960.[9] Undoubtedly it will be considered one of the really significant landmarks in the improvement of our judicial procedures.

In the area of administrative law, similar efforts to improve procedures have been in progress for approximately two decades. In 1941, a committee, appointed by the Attorney General of the United States, issued a comprehensive report on administrative law and procedures and recommended corrective legislation.[10] By 1943, the American Bar Association had crystalized its views toward a proposed comprehensive statute for federal administrative practice. The foregoing efforts led to the enactment of the Administrative Procedure Act in 1946.[11]

While individual federal regulatory agencies each made its own efforts to improve and expedite the administrative proceedings, no single postwar across-the-board effort to do so took place until the establishment of the Commission on Organization of the Executive Branch of the Government in 1947, with former President Hoover as Chairman.[12] This was followed by the Conference on Administrative Procedure, called by the President on April 29, 1953, with Judge E. Barrett Prettyman as Chairman.

The Conference studied a series of subjects, including those suggested by the Judicial Conference of the United States, those suggested by the Attorney General, and a number suggested from the floor of the Conference. The Report of the Conference of March 1955, contains numerous recommendations adopted by the Conference designed to simplify, control, and expedite administrative proceedings. Among its significant recommendations were those dealing with the use of prehearing conferences for the specification of issues and simplification of proof, the submission of documentary evidence in advance, the organization of evidentiary data, the use of trial briefs, and numerous other techniques for the elimination of unnecessary delay, expense, and volume of records in administrative proceedings.

More recently three other important events have drawn attention to the procedures of the federal administrative agencies in an effort to improve their functions. The first was the Landis Report on regulatory agencies of December 1960, to the President-Elect, in which Mr. Landis proposed a reorganization of the major regulatory tribunals and recommended a reconstitution of the Administrative Conference of the United States similar to that which the President called on April 29, 1953.[13] The second

[9] Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 351 (1960). See, McAllister, *The Judicial Conference Handbook on Procedures for the Trial of Protracted Cases*, 47 A.B.A.J. 568 (1961).

[10] Final Report of the Attorney General's Committee on Administrative Procedure (1941).

[11] For the legislative history of the Administrative Procedure Act, see Administrative Procedure Act—Legislative History, Sen. Doc. No. 248, 79th Cong., 2d Sess. (1946) and citations in the Attorney General's Manual on the Administrative Procedure Act (1947), at p. 8.

[12] Established in accordance with Public Law 162, 80th Congress, July 7, 1947, and Public Law 108, 83rd Congress, July 10, 1953. The Hoover Commission issued Reports on various departments and activities of the federal government in 1949, and a Report on Legal Services and Procedure in 1955. In each instance these reports were made to the Congress of the United States.

[13] Report on Regulatory Agencies to the President-Elect, Dec. 1960, by Hon. James M. Landis. Between January and September 1961, Mr. Landis served as Special Advisor to the President on

event was the establishment of the Administrative Conference of the United States as set up by Executive Order No. 10934 of April 13, 1961, to assist the President, the Congress, and the administrative agencies and executive departments in improving administrative procedures.[14] The third event involved the Presidential plans submitted to and in some cases approved by the last Congress for reorganization of several of the major administrative agencies.

Reorganization Plan No. 3 of 1961 recently became effective for the CAB.[15] Under this authority the Board may delegate functions to a division of the Board, an individual board member, a hearing examiner, or an employee or employee board. The Board retains authority to review any action so taken. In addition, Plan No. 3 transfers from the Board to its Chairman certain functions with respect to the assignment of personnel to perform such duties as may have been delegated by the Board.

In order to implement the objectives underlying Reorganization Plan No. 3 of 1961, the Board on September 12, 1961, issued a Notice of Proposed Rule Making[16] to the effect that the Board had under consideration proposed amendments of the Rules of Practice in Air Safety and Economic Proceedings,[17] which would expressly delegate to hearing examiners the Board's functions of making agency decisions.

On January 23, 1962, for effect on February 1, 1962, the Board promulgated new procedural regulations (PR-58 and PR-59) amending Parts 301 and 302 of the Board's Rules which expressly delegate to hearing examiners the Board's function of making agency decisions and prescribe appropriate procedures for discretionary review by the Board of examiners' decisions made pursuant to such delegation. The major purpose sought to be achieved by the Board is the substitution of certiorari type review procedures, which will give the Board discretion to determine when review is appropriate, in lieu of the former practice by which the Board gave de novo consideration to each and every issue raised by exception to an examiner's decision.

Under this delegation, the examiners will render initial decisions from which an appeal to the Board will not lie. The Board will, however, retain a discretionary right to review such decisions, upon petitions for review or upon its own motion if two or more Board Members vote for review. Under the new procedures, appeals will no longer automatically be passed upon by the Board. Where Board review is had, it will be limited to those issues specified in the Board's order exercising review. It is the Board's belief that these procedures can appreciably expedite the final disposition of formal Board proceedings.

Regulatory Agencies. The Report was also submitted to the Congress of the United States and is available as a Committee Print of the Subcommittee on Administrative Practice and Procedure to the Committee on the Judiciary of the United States Senate.

[14] The Conference, with Judge E. Barrett Prettyman as Chairman, consists of a Council of 11 members each named by the President, and of a general membership chosen by the Council in accordance with Executive Order No. 10934 and the by-laws of the Conference.

[15] Effective July 3, 1961, under the provisions of § 6 of the Reorganization Act of 1949, as amended; published pursuant to § 11 of the Act (63 Stat. 203) in the Federal Register on July 4, 1961 (26 Fed. Reg. 5989).

[16] 26 Fed. Reg. 8642.

[17] 14 C.F.R., Parts 301 and 302.

III. Expediting Proceedings at the CAB

Perhaps the most useful way of approaching the problem of handling the large case in administrative practice at the Civil Aeronautics Board is to catalogue the techniques that the Board and its examiners have already developed to organize and control such a proceeding. Except for enforcement matters, which go to hearing directly upon complaint or petition, these techniques have been used in most types of proceedings, including licensing cases, mail rate proceedings, and cases involving the unification or merger of air carriers. Except for periodic modifications, the basic arts of expediting the large proceeding, such as pre-trial, investigatory and subpoena procedures for the production of proof, submission of documentary evidence in advance, requirement of the "written case" and delegation of some authority to hearing examiners over interlocutory matters arising during the course of the hearing, have been a part of Board procedures since shortly after its creation in 1938. Obviously, the techniques hereafter analyzed cannot in all respects be utilized by other administrative agencies whose problems are different from those of the Board.

A. *Prehearing Procedures*

It is a commonplace to say that the most important aid to the expedition of the large case is proper organization. To this end state and federal courts have instituted the device of the pre-trial conference, with some jurisdictions making pre-trial procedures mandatory in every large civil case. In spite of the extraordinary success with pre-trial techniques in both state and federal courts in handling protracted cases, the federal administrative agencies have, with few exceptions, been slow in adopting and utilizing pre-trial and related techniques for the control, organization, and expedition of large proceedings.

The Rules of Practice of the Civil Aeronautics Board have provided for the use of pre-trial conferences in formal cases since 1940 under a rule modeled after Rule 16 of the Federal Rules of Civil Procedure. In its present form the same Rule of Practice[18] also gives examiners authority to entertain offers of settlement of issues as provided for in sections 5(b) and 7(b) of the Administrative Procedure Act.

While a great deal has been accomplished by the Board's examiners in the two score years of experience with the pre-trial techniques, their functions in the pre-trial stages of proceedings have been somewhat confined because of the interlocutory participation of the agency. Whereas the examiners have the responsibility for the formulation of issues (except for permissive appeals of their rulings to the Board) in most types of proceedings, the Board still establishes the scope of the proceeding and the issues therefor in the largest category of formal cases—i.e., applications for new air routes. The examiner's role in the latter type of proceedings as to the definition of issues is largely the dual task of mediation between the parties and thereafter recommending proposed issues to the Board.

Obviously, until the issues are settled, the complete organization of a trial at the prehearing conference is not possible. The practice of having the Board make final rulings on proposed issues in new route cases after

[18] 14 C.F.R. 302.23.

the initial pre-trial conference not only consumes much time in itself but it often necessitates a further pre-trial meeting. It would be most desirable to give the examiners full authority with respect to the formulation of the issues to be tried in any type of proceeding before the Board. There is no sound reason why the general rule of law that agency rulings on interlocutory matters are not ripe for judicial review until final decision should not also apply to review by the agency of interlocutory rulings of its examiners.

Unlike the situation in certain other federal administrative agencies, the examiners at the CAB have the authority to sign and issue subpoenas for both the attendance of witnesses and the production of documentary evidence except in the one situation noted below. Similarly, rulings of CAB examiners on most matters of procedure may not be appealed to the Board prior to its consideration of the entire proceeding except in extraordinary circumstances and then only with the consent of the examiner. One notable exception to the consent rule relates to compulsory testimony by Board personnel. Since Board regulations prohibit its officers and employees from disclosing official CAB information without Board approval, an examiner's ruling granting a motion for testimony by Board Members, officers or employees, or the production of documents in their custody is reviewable by the Board on its own motion. On the other hand, rulings by CAB examiners on motions to quash subpoenas other than those involving Board personnel or records may be appealed to the Board only with the examiner's consent.

Perhaps the most effective authority of CAB examiners for asserting major control over a proceeding lies in the power to compel proof through subpoenas and other processes provided for in the Federal Aviation Act and the Board's Rules of Practice. As in the courts, the pre-trial conference in an administrative proceeding is primarily a device for controlling and organizing the proof. But no court has the exploratory powers which are available to CAB examiners in directing and marshalling the probable proof in a proceeding. After a settlement of the issues of fact and of law, it is the examiner's function to prescribe the basic areas of probable proof, direct the manner in which such proof is to be organized and indexed, and provide for the further necessary procedures for its orderly reception in the record.

While asserting control over and organizing a proceeding presents the greatest opportunity for leadership on the part of the examiner, it is also the area of most difficulty. Effective control over a proceeding requires study, planning, and guidance on the part of the examiner. In failing to lead the pre-trial conference in the search for the nature and limits of the probable proof and in allowing one or more of the parties to dominate the discussion as to what the issues require in the way of evidence beyond that which can be officially noticed or incorporated by reference, the examiner often fails to obtain agreement from the parties or to make adequate prescription on his own for the limits of the proof necessary to a fair trial of the issues. Except in compliance and various types of investigatory proceedings, the available proof for the typical rate, route, or air carrier unification proceeding at the Civil Aeronautics Board is quite standard and pretty well institutionalized. Such proof is largely concentrated in the files of the agency or in the records of parties

to the litigation. In such circumstances, it is not generally difficult to organize a complete evidentiary case with regard to each issue and to delineate its substance and boundaries in a succinct pre-trial order or report. It is the unusually complex and atypical proceeding that requires special procedures and techniques to insure a manageable and expeditious hearing and record.

Although not widely used even in the largest of CAB proceedings, trial briefs, as the last written step in pre-trial preparations, have been utilized in several large cases at the Board. Reduced to concrete practice, a true trial brief should set forth a party's theory of its case and a brief resume of its proposed proof. The principal value of trial briefs in large and complex proceedings lies in the more thorough preparation of counsel for trial in advance of the hearing through a clear statement of his client's position in the proceeding. Moreover, the trial brief also helps the examiner and each counsel to understand the theory of each party's case and the areas of proof which each party deems important. It compels a more ready comprehension of the multiplicity of problems that arise in the hearing stage in connection with arguments on motions, objections, admissibility of proposed proof, and the not infrequent requests at the hearing for further evidence. To be of maximum value without burdensome extra paper work, the trial brief must avoid the evidentiary detail already submitted in exhibit form and analyses of the law more appropriate for later briefs.

With all the current emphasis on the organization, control, and writing of the proposed evidence in an administrative proceeding, it must, however, be borne in mind that it is quite possible to over-organize, over-control, and over-write an administrative record. During the early months of 1953, the Federal Communications Commission amended its rules relating to practice and procedure governing the trial of comparative qualifications in broadcast proceedings to provide for the submission of "specific points of reliance" by various parties to the proceeding.[19] The announced purpose of the new rule was to "develop and sharpen the genuine issues of a broadcast hearing sufficiently in advance of the adducing of proof, to eliminate, in the largest part, the element of surprise, the introduction of unnecessary and cumulative evidence, and the waste of time during the course of the hearing." After the exchange between the parties of such "reliance points" the examiner assigned to the prehearing conference was to rule upon the significant areas of difference between the applicants upon which to go to trial. Not only did this unusual procedure require the exchange of very voluminous preliminary information, much of which was never received in the evidentiary record, but the very task of deciding at the pre-trial stage of a case on satisfactory points of reliance and significant areas of difference between the applicants for trial purposes proved to be unmanageable. During a protracted prehearing conference in one proceeding, nine days were spent ironing out proposed procedures under the "points of reliance" system.[20] This system was abandoned after approximately one year of experience.[21]

[19] FCC Public Notice 53-199, Feb. 9, 1953 (47 C.F.R. § 1.841 (1954)).

[20] South Central Broadcasting Corp., FCC Docket 10461 *et al.*, 9 Pike & Fischer Radio Reg. 416, 1035 (1953). Unreported memorandum opinion and order of the examiner in FCC Docket 10461 *et al.*, Nov. 11, 1953.

[21] For a critique of the "points of reliance procedures" see comments in the *Report of the*

Under current practice of the examiners at the CAB, the preparation of the written case by each party is controlled by specific ground rules or principles of practice which are explained at the prehearing conference and made a part of the written order or report thereof. Those rules or practice guides set forth the requirements on the part of each party regarding the preparation and organization of its written case, uniform rules relating to authentication of documents, regulations governing the submission and exchange of written exhibits and proposed written testimony in advance, limitations on the kind of expert testimony allowed, and certain controls over the direct and cross-examination of witnesses.[22]

B. *Hearing Procedures*

Having organized the presentation of the written case and prescribed the rules for the conduct of the hearing, the critical tests of procedures designed to expedite a large proceeding come at the hearing. On the whole, CAB examiners have had admirable cooperation from both the regular practitioners before the Board and from the many attorneys representing civic groups from whom a pre-organized proceeding before an administrative agency is often a new experience. Nevertheless, even better organization of the trial at the pre-trial stage and tighter controls both in the participation of the written case and at the trial stage can be had without offense in any way to the requirements of due process and a fair hearing.

Cross-examination of witnesses on the huge volumes of written material submitted for the evidentiary records in large Board proceedings consumes an estimated ninety-five per cent of the total hearing time. Although much less now than several years ago, the CAB practitioner still has a tendency to over cross-examine. Can cross-examination be limited by the presiding officer in an administrative proceeding without unfairness or legal error?

An arbitrary time limit on the cross-examination of witnesses is impractical and would inevitably lead to unfairness. Absent the unlikely agreement of all counsel to a proceeding, such a limit would constitute possible legal error. Aside from the usual devices of stipulating facts through agreement of counsel and sharpening the issues to avoid the prolixity of proof which a mere paraphrase of the ultimate issues invariably invites, the task of controlling and reducing the volume of cross-examination is almost wholly a matter of the skills and personality of the presiding officer. He should know well the substantive subject of the case over which he is presiding; he should know the law of evidence and its application in myriads of varying situations; and, above all, he must be able, ready, and willing to rule. The examiners' failure to rule promptly, firmly, and clearly is the most familiar lament of practitioners before federal administrative agencies.

Cross-examination, of course, should not be controlled or reduced merely because it will produce a shortened record. A public hearing in an

Committee on Communications to the Administrative Law Section of the American Bar Association, 6 Ad. L. Bull. 173, 184 (1954).

[22] In most situations, it is possible to obtain agreement among the parties to the procedures noted above. Even in the absence of agreement, the parties are bound by the provisions of the order or report on the prehearing conference, unless upon exception thereto particular procedures are modified or relaxed to prevent injustice or unfairness.

administrative proceeding is not a contest as such; the primary purpose of such a hearing is to search for the truth. Nevertheless, the presiding officer in a large administrative proceeding is usually faced with attempts at a great deal of broad, hit-or-miss and manifestly useless cross-examination. There is a tendency among practitioners to over cross-examine, particularly in the case of the practitioner not prepared for his task or unlearned in the art of asking simple, direct, and relevant questions. It is this overly broad, random, haphazard, or unusually methodical cross-examination in administrative proceedings which causes problems for the presiding officer.

Through individual study and experience and through frequent staff meetings on the subject with the Chief Examiner, the examiners of the Civil Aeronautics Board have developed and used rules and practices which for years have helped to cut down on unnecessary cross-examination and have thereby shortened records. For example, the so-called "policy" witness has in recent years been excluded as a witness in that guise. Such witnesses have usually been high executives of airlines and their testimony was often argumentative and as broad or broader in scope than the ultimate issues to be decided. In lieu of the so-called "policy" witness, counsel for the carriers are permitted to make a brief statement in the carrier's written case of the basic position of his client in the proceeding. Where trial briefs are required, the briefs set forth each party's position. Except in rare instances where examination on such a statement of position would produce relevant and material information regarding possible inconsistency in a party's position, cross-examination is not allowed on these statements.

To avoid cross-examination on irrelevant or incompetent data and argument on later motions to strike, rulings on the admissibility of a party's written case are made at the close of the examination of witnesses on direct. Except for government counsel who plays the role of the public defender, cross-examination is limited to witnesses whose testimony is adverse to the party desiring to cross-examine. Cross-examination is likewise limited to one round of questions except on a showing of good cause and then only with the permission of the presiding officer. Moreover, cross-examination of any particular witness, or presentation of any motion or objection and answer thereto at the hearing is limited to one attorney for a party, except on a showing of good cause and with the permission of the presiding officer. Similarly, oral presentation of any motion or objection is limited to the party making the motion or objection and the party or parties against whom the motion or objection is made except with the permission of the presiding officer. Further, clarifying or qualifying questions by a non cross-examiner, which often mar and delay the conduct of many administrative hearings, are not allowed at the CAB except on a showing of good cause and with the permission of the presiding officer.

In addition to the foregoing methods and procedures, the successful presiding officer in administrative proceedings must insist on a much stricter application of the rules of evidence than has characterized the typical administrative proceeding in the past. The abomination of "letting it in for what it's worth" is the classic manner of a weak presiding officer. Either an item of data or information is worth something to the record

or it should not be admitted at all. Allowing the reception of proffered evidence subject to a later motion to strike often leads to a duplication of argument on such motions and consequent waste of time.

Failure of examiners to organize their case at the pre-trial conference, including failure to use readily available discovery procedures for the assembly of a complete written case before trial and the lack of clear methods in the handling of documentary evidence prior to hearing, likewise cause confusion and avoidable delays in the hearing stage of the proceeding. On the other hand, a clear organization of the proof at the time of pre-trial, prompt rulings on discovery motions and objections, limitations on the type and time duration of the proposed proof, the proper indexing and sequential organization of the written case, the occasional use of trial briefs, a pre-arranged trial schedule, and an index of the transcript as the hearing proceeds all help to make for an orderly and expeditious record.

The techniques to be employed by the effective examiner will of course vary from case to case. A number of the practices already discussed would not apply to a simple, single-issue proceeding lest such devices cause more organizational control and more paper work than necessary.

As is no doubt true of other agencies, the examiners of the Board are constantly badgered with suggestions as to means for shortening records. While innovations which promise probable good practice are to be encouraged, the examiner must proceed with caution.

Thus, limitations on argument with respect to motions and objections are often feasible. Offers of proof may well be submitted in writing, thereby saving the time it takes to make them orally on the record. Limiting the testimony of expert witnesses to the specific narrow factual issues determined at pre-trial, an advance identification of such witnesses and the rejection of proposed expert testimony in violation of pre-trial arrangements are necessary controls in the areas of proof of technical data. Similarly, the requirements of written memoranda on points of law will often aid the examiner in controlling the proposed examination of witnesses.

Tight reins are essential in the case of requests for further evidence at the hearing stage which were unforeseen at the time of pre-trial, particularly as to demands for proof which may be frivolous or at best for data which may be only marginally probative. Further, a requirement that counsel submit to the examiner in advance the proposed scope and nature of any proposed cross-examination is also a practical technique for controlling the course of a hearing in a big and unwieldly proceeding.

On the other hand, various proposals for controlling the hearing and reducing the time spent in the examination of witnesses may well be impracticable or undesirable. For example, a requirement for presenting all evidence relating to each issue at one time would probably waste more time and effort than it would save. Such a procedure might necessitate the call and re-call of witnesses from time to time. It would jumble a transcript. Moreover, the inconvenience to out-of-town witnesses of such a procedure is readily apparent.

It has been suggested that the examiner should have the right to assess costs against a losing party (other than the administrative agency) so that the proffer of irrelevant data or the use of frivolous defenses be dis-

couraged. But aside from the additional time this procedure would consume, such a disciplinary measure in the hands of the examiners seems unnecessary and contrary to the public interest. It has further been urged that examiners (as well as agency members) be given contempt powers as an aid to the solutions of the problems of delay. While even justices of the peace have such powers, contemptuous conduct on the part of practitioners in administrative proceedings is rare, and less drastic means are available in such situations. Nor is such power necessary to insure the production and submission of relevant testimony and evidence at hearings. Rarely is the CAB obliged to go to court for the enforcement of subpoenas.

Finally, it has been suggested that the agency promulgate, in addition to its procedural regulations, strict standards of practice which the examiners would use in managing the large proceedings as a uniform system for litigating all the large cases. This would be most impracticable. It has been the author's experience that even very large proceedings vary as to how much organization and control they require at pre-trial; that what works well in one type of a proceeding may be practically useless in another; and that on occasion some of the techniques already described, such as the use of trial briefs and advance written notice of the proposed areas of cross-examination, be better omitted if only for the reason that a large administrative proceeding is already burdened with much paper work.

C. *Post-Hearing Procedures*

The time between the conclusion of a hearing and the Board's final decision in most cases represents a substantial part of the total time consumed in large administrative proceedings at the CAB. Some of this represents avoidable delay.

Aside from removing other causes of delay at this stage of the proceedings, better organization, indexing, and control of the proposed evidentiary record at pre-trial would hasten the task for both counsel for the litigants and the examiners in locating the evidence after the hearings close, particularly through a daily index of the transcript of testimony cross-referenced to exhibit material exchanged before trial. A digest or a summary by one or more of the litigants of the evidence immediately after trial was attempted at the CAB but was discarded after understandable attacks of bias or inaccuracy. Similar digests or summaries accompanying proposed findings and conclusions to the examiner are of dubious value to an examiner hearing the evidence and relying on his own digest of the record. This latter technique is avoided at the CAB by a rule of practice limiting proposed findings to 50 pages in length—a rule which may be relaxed only in exceptional circumstances.

In many of the Board's large proceedings, the examiners' initial decisions are much too long. Since it is much more difficult and time consuming to organize and write a shorter and more succinct set of findings on a huge record than a longer report, this prolixity in the examiners' findings is in part due to pressures for rendering "expedited" initial decisions after hearing. Hardly a large CAB proceeding in recent years has failed to have an "expedited" tag in the order initiating it. Moreover, with the closing of the record (which, at the CAB, not uncommonly consists of ten to twenty or thirty thousand or more pages of written material inclusive of the transcript of hearing) the examiner is often in dire need

of statistical or other analytical assistance for the testing and organization of complex technical data. While such help has been available heretofore on a somewhat sporadic basis, a better organized system of statistical and analytical assistance to examiners in large proceedings has recently been instituted at the Board. This assistance is provided through the Office of Carrier Accounts and Statistics, a branch of the Board completely independent of other offices and bureaus of the Board.

With the issuance of his initial or recommended decision, the function of the examiner in a proceeding usually ends. But there seems to be no reason why agency members should not utilize the examiners' knowledge of the record in their deliberations on the evidence over which he has presided. Individual Board Members simply do not have the time to read in detail and master each of the many smaller formal records upon which they render decision and much less so the massive volume of intricate evidentiary data in the larger cases. The Board's reliance upon staff advice in most hearing cases is a sheer necessity. Institutional decisions, arrived at by the agency in consultation with its advisory staff including the person who heard the evidence, may in the end be more sound than those arrived at by an agency isolated from its experts. This is particularly the case in licensing and rate making proceedings involving highly complicated technical data, numerous conflicting statistical forecasts, and ramifications for good or evil extending far beyond each individual case.

It has long been clear that consideration of all the Board's functions by the agency en banc has placed an intolerable strain on its time and efforts. Given the mass of minor and routine matters all of which heretofore required disposition at the agency level, the recent delegation of authority for final decision in such cases to examiners and the substitution of discretionary review for the right of automatic appeal from an examiner's decision in all cases, should free a great deal of the Board's time for the larger formal proceedings on its calendar which it decides to review. It has also been clear that significant time improvements in the disposition of the total functions of the Board lie not only in the speeding up of the proceedings at the examiner level and delegating responsibility in routine matters; but also in shortening the time between the examiner's decision and the Board's final decision in those cases in which the Board exercises its discretionary power of review.[23]

The Board has for many years now had a target date system for assessing the examiners' productivity in preparing initial decisions. Under these internal arrangements, each examiner reports to the agency a proposed target date for the issuance of his initial decision after the conclusion of hearings. This system, which provides in effect a tailor-made standard of production subject to the Chief Examiner's approval in each case, has been thought to be superior to a single standard for all cases because of variations in the size and complexity of CAB proceedings.

Numerous management time studies have been made at the CAB of the time consumed in the preparation of initial decisions as well as final decisions by the agency. Significantly, for the survey period July 1, 1953, to September 1, 1957, the average time between the submission of cases

[23] The Board's delegation of authority to examiners does not extend to proceedings arising under § 801 of the Federal Aviation Act which require Presidential approval of the Board's action and in which proceedings the examiner renders a recommended decision.

to an examiner for decision (the date proposed findings were filed, or, if proposed findings were waived, the date hearings ended) and the service on the parties of the examiner's initial decision has been about the same as the average time consumed between the submission of cases to the Board for decision (last day of oral argument, or, if no argument, the date oral argument was waived) and the date of the Board's decision. The arithmetic average time for examiners' initial decisions was fifty-one days and that for Board decisions was fifty-eight days.

The foregoing survey of all proceedings inevitably included a large number of relatively simple cases. In order to obtain an average for more complex cases during the same survey period, a separate study was made consisting only of those cases in which there was oral argument before the Board. This showed an arithmetic average of 139 days from the date of hearing to initial decision; eighty days from the filing of proposed findings to the date of initial decision; and seventy days from the date of oral argument to Board decision.[24]

In the large complex economic proceedings, it is understandable why the examiner may take more time in writing his initial decision than the Board does in preparing its final decision. It is the examiner who initially combs the record and organizes and writes findings and conclusions. By the time the record reaches the Board most, if not all, of the sifting and winnowing of the relevant facts and applicable law has been accomplished. On the other hand, the Board has numerous other functions to perform in addition to the disposition of formal adjudicatory proceedings.

Whatever limitations of statistical measurement the foregoing surveys may have, they do point roughly to the substantial amount of time spent on the decisional processes in CAB proceedings. While the process by which a court of law hears the evidence and then decides an ordinary law suit is usually much faster than the process by which an examiner and his agency decide their complex proceedings, it must be remembered that the large economic proceedings before the Board are more akin to anti-trust and similar protracted proceedings in the federal district courts than they are to the run-of-the-mill litigation in either state or federal trial courts.

Since the law provides that each party to an adversary proceeding before the Board must be given full opportunity to be heard, including the rights to notice, cross-examination, the submission of proposed findings, exceptions, and oral argument on exceptions, the further steps to shorten records and cut down time of hearing must be accomplished within the framework of existing law and established judicial procedures. The recent Reorganization Plan No. 3 for the CAB offers the hope of some solution to this problem through effective delegation of the function of decision making and discretionary review by the agency which should obviate two separate sets of proposed findings, often identical if not substantially repetitive, and the delays inherent by rendering decision through a trial examiner and then later de novo through his agency. However, there are other procedures that offer promise of even greater streamlining in the disposition of decisions of the CAB.

[24] The above time periods are inclusive of week-ends and holidays. These time periods also included the time required to cut stencils and the publication and service of the initial and final decisions.

IV. Suggested Further Improvements in Formal Procedures

A. *New Route Cases*

As hereinafter discussed in more detail, it has been suggested that federal administrative agencies utilize non-hearing procedures in the disposition of their duties, particularly in non-adversary situations.[25] The bulk of CAB proceedings continue to involve major new air route awards. It is difficult to see how such proceedings could be processed fairly under informal Board or executive procedures. Indeed, Board proceedings in the area of substantial air route revisions are not only adversary in the true sense of the word; the adversaries involved in such proceedings (including both air carriers and cities vying for new or additional air service) are generally the more contentious of litigants in CAB proceedings.

Those of us who have known *ex parte* pressures to intrude upon the decisional process in major new route cases in spite of carefully followed judicial procedures shudder at what these pressures might be like if decision in such cases were left to more informal procedures at either the Board or some executive department. This is not to say, however, that Board procedures in this area cannot be simplified and shortened within the framework and protections of trial-type judicial procedures. The following suggestions are not made with the idea that they constitute the only sound solution to the vexing problem of expediting large new route proceedings at the Board. It is hoped that they will draw other and perhaps more expert attention to the problem.

1. As a first step, the Board through its technical staff should establish projected route patterns for the various areas of the country prior to any formal Board proceeding. Most of the critical decisional facts involving proposed new route awards are already lodged in the Board files in the way of required filings of traffic statistics, the carriers' operating data and numerous economic indices from federal or local government sources. Concurrently with the order initiating a new route proceeding, the projected route pattern plan, buttressed by data already available to the Board's staff, could be circulated to all prospective air carrier parties, including those with pending applications for additional service within the area of inquiry and to all cities within that area, either in the form of an order to show cause or a simple order of investigation. With an operating air route network already covering the entire country and all major international air lanes, it should no longer be necessary to take to trial every conceivable proposed improvement of the over-all air route system on an *ad hoc* basis. With a tentative proposal in the hands of the prospective parties, reliance should then be placed wholly upon the examiner to take the proceeding through its pre-trial, hearing, and initial decision stages.[26]

2. As a necessary second step, examiners of the Board should be authorized to pass upon all interlocutory matters. Questions such as the scope of the issues, proposed interventions, conflicts with pending applica-

[25] See, for example, Davis, *Dueprocessitis in the Atomic Energy Commission*, 47 A.B.A.J. 782 (1961).

[26] In several recently instituted new route proceedings the Board has utilized the order to show cause technique much in the manner outlined above. However, certain difficulties have arisen with these procedures, primarily because the orders to show cause fail properly to anticipate all of the issues to be litigated.

tions, *inter alia*, should be initially decided by the examiner subject to review by the Board in its final decision.

3. As an indispensable third step, more rigid control should be imposed upon the type of proof submitted for new route proceedings. Most importantly, it simply is not necessary to go through the laborious process of cross-examination on all the minutiae which currently seem to concern the CAB practitioners. With the tentative proposals for new route improvements as a starting point, the examiner must then make much more effective use of pre-trial procedures. For example, air carrier applicants continue to present considerable proof on various criteria of air carrier choice such as alleged pioneering, the historical interest of the applicant in the area under inquiry, elaborate scheduling plans which at best can only be tentative, proposed lower fares and an alleged superior sales effort, each of which should bear no or at best but very marginal weight as matters of decisional preference in the selection of air carriers. Similarly, the civic parties to new route proceedings continue to present a substantial volume of virtually fruitless "boiler-plate" type of information regarding utilities, recreational facilities, school enrollments, and other general economic data, none or little of which helps to measure a community's need for new or additional air service.

4. As a logical fourth step, the course of the proceeding should be drastically changed. Instead of going to hearing after the exchange of direct and rebuttal exhibits, as is now the case, the parties would exchange written interrogatories, requiring, if need be, explanations and corrections in the exhibit materials already exchanged. These interrogatories would be answered in a further or third exchange of exhibits along with any surrebuttal materials to answer possible new matters which may have arisen. On a certain day following the exchange of written replies to the interrogatories and surrebuttal materials, the parties would be directed to exchange requests for specified areas of cross-examination on each other party's case. Perhaps two or at the most three witnesses would be allowed to sponsor each party's complete case in the formal hearing to follow. A short time prior to the formal hearing, however, a further prehearing conference could be held for the purpose of obtaining agreement on the waiver of cross-examination in the various areas of proposed evidence, further stipulation of agreed facts for the record, and the necessary clarifications of remaining procedures. The formal hearing would be strictly limited to areas of cross-examination not waived or limited at the second prehearing conference, the reception of written exhibit materials including proposed written testimony, and offers of proof. Following such formal hearing, the remaining procedural steps could be further shortened or expedited.

5. Thus, as a final step, two further types of procedures could be utilized to speed up the disposition of new route awards. In the smaller proceedings, the steps already taken would very likely enable the examiner to announce his decision orally on the record in the manner of a court after trial. In such situations, the parties could be asked to present proposed findings and an order which the examiner could work with to expedite his initial decision. In the larger proceedings, considerably shorter limits of time than now allowed would be set for the filing of proposed findings and conclusions and briefs. Extensions of this time for the latter

filings would be allowed only in exceptional circumstances. Moreover, the proposed findings, conclusions, and briefs in the major proceedings should be limited to those areas of proof which were contested at the formal hearing.

B. *Proceedings Other Than New Route Cases*

In addition to the proposed improvement in formal cases involving new route issues, the formal procedures now in use in other areas of the Board's functions warrant change in various limited ways. However, it bears repeating that any type of formal procedure in these latter areas will necessarily be time consuming because the proceedings are also of the type that are very large and affect substantial vital interests of both the public and the industry. Moreover, it is also well to bear in mind that elaborate management procedures such as pre-arranged pre-trial, trial, and initial decision schedules which can be relaxed only with the permission of management or a management committee, often look better on paper than they work out in actual practice. Such procedures in themselves are bothersome and time consuming. Finally, because formal proceedings at the Board are not alike in priority or importance, strict management schedules for one proceeding may destroy flexibility in the assignment of proceedings to the examiners. Tying an examiner down to an inflexible assignment in one proceeding may make him unavailable for the numerous intermediate procedural tasks in other cases that can be normally accomplished when the examiner is assigned to four or five or more proceedings at one time. Nevertheless, there are places where further streamlining is possible in the Board's process in the several functions other than new route proceedings.

1. Without exploring the economics of the problem here, it is now quite obvious that the air transport industry may soon require a merger of certain of its weaker units with its stronger ones. While the Board cannot compel air carriers to combine against their will, the Board does not have to wait until a carrier *in extremis* asks that the highest bidder be allowed to buy its operation. There is nothing to prevent an over-all study of those possible unifications which make the most sense for both the public and the industry. Such a tentative study, either in the form of an order to show cause or an order of investigation, served upon all interested carriers and cities, should not only help to induce desirable air carrier mergers but also provide a basis for much shorter formal proceedings in the event the arrangements tentatively arrived at by the Board are accepted by the affected carriers.

2. The Board has long had an informal mail rate conference procedure[27] whereby most of the Board's mail rate proceedings are settled through non-hearing procedures. The Board also utilizes the system of establishing class rates of mail compensation for both domestic trunkline and local service carriers.

With respect to those mail rate proceedings not settled through the informal conference procedure, there is not much that can be done outside of applying the moral procedures of expedition of pre-trial, a written record, and the other techniques of the kind now used in new route proceedings. As a matter of fact, such mail rate proceedings are very few

[27] 14 C.F.R. 302.311-321.

in number and more likely than not involve problems that are sui generis, For example, the *Transatlantic Final Mail Rate Case*[28] of several years ago, involved the final rates of mail compensation for the transatlantic operations of American flag carriers for a past period of eight years. The very recent *Reopened Pan American Mail Rate Case*[29] involved, *inter alia*, an inquiry into the carrier's past accounting procedures for its system-wide operations and a re-examination of the rates of mail compensation heretofore established for this carrier for a long period of time. The nature of the latter two and similar mail rate proceedings necessitates proof on a large volume of highly complex issues and detailed and painstaking cross-examination thereon is hardly avoidable. For this and other reasons, the shortened procedures suggested herein for large new route proceedings cannot be suggested for all of the more complex mail rate proceedings at the CAB.[30]

3. Across-the-board changes in domestic passenger fares and cargo rates present special problems. The Board has the authority to suspend and investigate such fares and, after notice and hearing, to order changes. But because of changing general business conditions and the growing and volatile nature of the industry, it is obvious that "one-shot" judicial proceedings which are necessarily prolonged are hardly the best system for establishing such fares and rates on a prospective basis. Rather the problem of appropriate fares and rates is one that requires continuous internal agency surveillance and study. The prescription of such fares and rates might well be better done through a type of informal conference procedure now utilized by the Board in most mail cases.

V. Non-Hearing Procedures for the CAB

The suggested greater use of procedures of a non-judicial nature for the settlement of cases, particularly in situations where there are no adversaries, also offers opportunity for speeding up the Board's functions. To this end the Board, again under the powers it recently acquired under Reorganization Plan No. 3 of 1961,[31] broadened the scope of its earlier delegations of authority in nonhearing matters to various members of its staff. Among other things, these delegations give the staff authority to grant or deny intervention in formal proceedings, approve or deny applications for approval of certain interlocking relationships, approve or disapprove certain agreements between air carriers, administer the Board's accounting regulations, and compromise certain civil penalties imposed for the violation of the Board's air safety regulations.

Although further non-hearing procedures in some instances may require amendment of the Federal Aviation Act allowing the parties to waive even a pro forma hearing, there seems to be no reason why—if

[28] Docket 1706 *et al.* (Orders E-8833 and E-9530, dated Dec. 20, 1954 and Aug. 30, 1955, respectively).

[29] Docket 1706A *et al.*

[30] As a matter of fact, as these comments were being written, and following 54 days of formal hearings, the proceedings in Docket 1706A were settled through the Board's informal mail rate conference procedure. Order Nos. E-18018 and E-18072, dated Feb. 13, 1962, and March 5, 1962, respectively. To what extent the formal hearings, which had approximately three more weeks to go, aided in producing a settlement cannot be deduced from aforesaid orders.

[31] Part 385 of the Board's Organization Regulations (Regulation No. OR-1) adopted on Dec. 18, 1961, for effect on Jan. 20, 1962.

hearings can be waived—informal disposition could not be made of other important types of proceedings arising at the CAB, including, among others, applications for minor improvements in the air route pattern or proposals for suspending or abandoning service at single points, foreign permit proceedings, air carrier equipment lease agreement cases other than contested proposed unifications of carriers, and certainly industry-wide changes in domestic passenger and cargo rates. Indeed, as already noted, the Board is already handling the bulk of its mail rate proceedings through its informal mail rate conference procedure. Moreover, where no real issue of fact is involved, summary judgment procedures modeled after the Federal Rules of Civil Procedure could well be utilized. There are various proceedings at the Board which could well go to decision after the filing of pleadings, with or without supporting affidavits. Further, informal procedures could also be utilized to determine the very frequent problem of whether air services between two or more points need additional competition with the choice of carrier to provide that competition left to formal hearing procedures. Obviously, without intensive effort at the settlement of proceedings through informal non-judicial procedures, it cannot be known how much of the Board's business can be settled at the conference table rather than at prolonged trial-type proceedings.

If informal conference procedures fail to arrive at satisfactory solutions in the public interest, resort can always be had to the formal hearing process. The important problem in processing matters through non-judicial procedures, even in the so-called non-adversary proceedings, is provision for adequate representation of the general public. Though the public interest could no doubt best be protected through a public or consumers' counsel housed as a separate independent agency, such an arrangement would be a considerable departure from present practice.[32] Absent such an arrangement, there is no reason why this cannot be done as well informally as it is now performed through government counsel in the trial-type cases.

VI. Miscellaneous Matters

As a further matter, a great deal can be done to expedite proceedings at the CAB through tidying and tightening existing procedures. In our concern to provide adequate due process, we often invite proliferation and delay.

1. The Board has recently adopted a new Rule of Practice[33] which amends its procedural regulations to prohibit the filing of unauthorized documents, including various documents which are now filed as informal correspondence rather than documents of the type contemplated by the rules. The Board and its staff have been particularly plagued by the practice of parties in economic proceedings in the filing of a multiplicity of responsive documents in the form of unauthorized answers, replies to such answers, and even replies to such replies. The new prohibition is

[32] It is unlikely that this country would ever entrust the oversight of its regulatory agencies to one man or office, as is the case of the Ombudsman in the Scandinavian countries. Nor is it clear that such a potentially autocratic system would be desirable. However, see Jägerskiöld, *The Swedish Ombudsman*, 109 U. Pa. L. Rev. 1077 (1961); *Cf.* Davis, *Ombudsman in America: Officers To Criticize Administrative Action*, 109 U. Pa. L. Rev. 1057 (1961).

[33] Amendment No. 6 to Part 302 of the Board's Rules of Practice in Economic Proceedings; Regulation PR-60, effective March 5, 1962 (14 C.F.R. Part 302).

designed to curb such unnecessary responsive pleadings and improper informal filings. For example, while the Board's regulations presently provide for petitions for reconsideration, re-hearing, or re-argument with respect to final orders of the Board, the practitioners before the Board have frequently violated the rule against successive petitions for reconsideration. Under the new rule change improper filings would not be accepted by the Docket Section of the Board and the sender of such documents as well as other parties to the proceeding are to be notified of the Board's action thereon. Moreover, another of the Board's recent amendments of its procedural regulations formalizing the manner in which civic groups may make requests for expedition of Board proceedings should reduce the huge volumes of *ex parte* communications to the Board requesting such expedition which has theretofore been the practice in new route proceedings.[34]

2. Substantial delays are also occasioned by the liberality in granting continuances on the part of examiners and the Board after the initiation of proceedings. When this practice extends to piecemeal hearings on various portions of proposed evidence over protracted periods of time, the resulting "trial by interval" unavoidably delays the disposition of cases. While inflexible time schedules for each case imposed by management at the time cases are started is not the answer to this problem, careful organization of all phases of proceedings at the pre-trial conference, an over-all target date for final decision, and less liberality in granting continuances at the intermediate stages of a case would make for significant time savings in the administrative process.

3. While CAB examiners have had a manual to guide them since the inception of the agency, this handbook needs revision in the light of recent progress made in handling trials in large proceedings, particularly in terms of the techniques developed by the courts in the disposition of protracted cases. Equally useful would be an attorney's manual for the guidance of agency counsel. There is no reason why these two projects should not be undertaken through informal meetings and with the cooperation of the agency's practitioners. The latter efforts might go a long way toward achieving more uniformity in practice in CAB hearings as to those basic procedures of expedition which are utilized in most of the agency's large cases.

VII. Conclusions

In the final analysis, the kind of expedition an administrative proceeding receives is but a reflection of the competence and efficiency of the persons concerned with it. This is not to say that the many substantive functions of an agency like the CAB cannot be considerably expedited through numerous improved and shortened procedures which have long proven themselves both in courts and in the administrative field. But the study of the adequacy of the procedures of administrative agencies must be a continuous process; care must be taken that proposals in improved procedures do not create more problems than they solve; and if new procedures are tried that do not work, then the agency should not hesitate to try again with procedures that show more promise in actual practice. With

[34] Regulation PR-44, effective Dec. 1, 1960 (14 C.F.R. Part 302.14).

respect to the latter comment, it might be well in some cases to experiment with drastic changes in established procedures by pilot programs rather than through wholesale across-the-board substitutions in current procedural regulations for all types of proceedings.

AIR CARRIERS' LIMITATION OF LIABILITY AND AIR PASSENGERS' ACCIDENT COMPENSATION UNDER THE WARSAW CONVENTON

By Peter H. Sand†

The author was awarded the 1962 Braniff Essay Award in Aviation Law, an annual award in memory of the late Thomas E. Braniff, airline pioneer, established by Roger J. Whiteford and Hubert A. Schneider of the law firm of Whiteford, Hart, Carmody and Wilson, Washington, D.C. This article first appeared in the American Journal of Comparative Law and is reprinted here through the courtesy of that journal.

ON September 22, 1961, the U.S. Interagency Group on International Aviation (IGIA)[1] invited comments on the relationship of the United States to the Hague Protocol[2] amending the *Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by air.*[3] Specifically, two questions were posed: (1) whether or not the State Department should recommend that the President withdraw the request to the Senate for advice and consent to the Hague Protocol; (2) whether or not the United States should withdraw from participation in the Warsaw Convention by giving the required six months' notice.

The "Warshaw Convention" of 1929 is today the most widely accepted treaty on international commercial law.[4] The amendments made at The Hague in 1955, which will become effective after ratification by 30

† Referendar, Saarbrücken/Germany (1958); Dipl. Sup. Droit Comparé, Luxemburg (1959); D.E.S. Droit Int. Publ., Paris (1960); Research Assistant, Institute of Air and Space Law, McGill Univ., Montreal (1960-61); Walter Perry Johnson Graduate Research Fellow in Law, Univ. of Calif. School of Law, Berkeley (1961-62). This paper is based on a memorandum submitted to the President's Interagency Group on International Aviation. The author is greatly indebted to Professors Richard M. Buxbaum, Albert A. Ehrenzweig, and Stefan A. Riesenfeld, of the School of Law at Berkeley, for their friendly guidance and valuable suggestions.

[1] Composed of the Departments of State, Commerce, and Defense; the Federal Aviation Agency; and the Civil Aeronautics Board. See IGIA Doc. 23/1.3 (Hearings, Dec. 18, 1961); see also Documents of the Air Coordinating Committee (ACC), Legal Division, ACC Doc. 51/22.28 (Revised), 22.28(A), 22.28(B).

[2] Protocol signed at The Hague on Sept. 28, 1955; ICAO Doc. 7632; 1955 U.S. & Can. Av. 521; Strauss, *Air Laws and Treaties of the World*, An Annotated Compilation Prepared for the Committee on Science and Astronautics, H.R. 87th Cong., 1st Sess. 1332 (G.P.O. 1961). *Cf.* Minutes of The Hague International Conference on Private Air Law 1955, held under the auspices of the Int'l Civil Aviation Organization (ICAO); ICAO Doc. 7686-LC/140, 2 vol. (Montreal 1956). The conference was preceded by drafting sessions of the Comité International Technique d'Experts Juridiques Aériens (CITEJA) in 1946, and of the ICAO Legal Committee (1946-53).

[3] Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on Oct. 12, 1929, entered into force on Feb. 13, 1933; 137 L.N.T.S. 11, No. 3145. Adherence advised by U.S. Senate on June 15, 1934; adherence declared on June 27, 1934; proclaimed Oct. 29, 1934, 49 Stat. 3000, T.S. No. 876; 1934 U.S. Av. 239. *Cf.*, Minutes of the IIème Conférence Internationale de Droit Privé Aérien 1929, (Warsaw 1930), reprinted ICAO Doc. 7838. The Conference was preceded by drafting sessions of the CITEJA (1926-28).

[4] As of April 1, 1961, the Convention was in force in 57 states, and in more than 60 dependent territories, colonies, etc. See 27 J. Air L. & Com. 375 (1960); 1960 U.S. & Can. Av., Treaty Data xii. The following are *not* members of the Convention: 4 states of the "socialist camp" (Albania, Cuba, North Korea, Outer Mongolia), 8 states of Asia and the Middle East (Afghanistan, Iran, Iraq, Saudi-Arabia, South Korea, Thailand, Turkey, Yemen), and 12 Latin-American states (Bolivia, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Nicaragua, Panama, Paraguay, Peru, Uruguay).

states,[5] have been commented upon by legal writers both here and abroad.[6] The discussion centers around the carrier's liability towards passengers, previously limited to approximately $8,300 per passenger under the Warsaw Convention,[7] and now doubled to approximately $17,000, under the Hague Protocol.[8] A group of compensation lawyers in the United States sees the Protocol as a chance to withdraw from the Convention entirely.[9]

With respect to the two questions posed by the IGIA memorandum, it would appear that they can be reduced to a single one. For, if the United States does *not* withdraw from the Convention, the only logical step is the immediate ratification of the Hague Protocol. Mere inaction; i.e., no ratification, would have the effect of perpetuating the present (low) limitation of liability, which neither advocates nor opponents of the Hague Protocol would desire. If, however, the United States *does* withdraw, there is no question of ratifying the Hague Protocol.[10]

Consequently, there is really only one question to answer: Should the United States withdraw from the Warsaw Convention?

I. The Warsaw Convention and the Carriers' Limitation of Liability

Opponents of the Convention explicitly declare that "the only provision to which they object" is Article 22, limiting the air carrier's liability to a maximum, and thereby, allegedly, making the Convention unfair to the passenger.[11]

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[5] As of April 1, 1961, 19 states had filed their ratifications with the Polish government, acting as depositary (Art. XXI, para. 3). Although some states seem to await action by the United States first, it may be expected that the required number of 30 ratifications (Art. XXII, para. 1) will be reached in 1962.

[6] See Beaumont, *The Warsaw Convention of 1929 as Amended by the Protocol Signed at The Hague on Sept. 28, 1955*, 22 J. Air L. & Com. 414 (1955); FitzGerald, Comment, 34 Can. B. Rev. 326 (1956); Mankiewicz, *The Hague Protocol to Amend the Warsaw Convention*, 5 Am. J. Comp. L. 78 (1956); Calkins, *Grand Canyon, Warsaw and The Hague Protocol*, 23 J. Air L. & Com. 255 (1956); Reiber, *Ratification of the Hague Protocol*, 23 J. Air L. & Com. 272 (1956); Garnault, *Le Protocole de la Haye*, 10 Revue Francaise De Droit Aérien 6 (1956); Riese, *Die Internationale Luftprivatrechts-konferenz im Haag zur Revision des Warschauer Abkommens*, 5 Zeitschrift Für Luftrecht 4 (1956); Mankiewicz, *Conflits entre la convention de Varsovie et le protocole de la Haye*, 19 Revue Generale de l'Air 239 (1956); Whitehead, *Some Aspects of Warsaw Convention and The Hague Protocol to Amend*, 1957 Proceedings of A.B.A. Section of Insurance, Negligence and Compensation Law 37; Ass'n of the Bar of the City of New York, *Report on the Warsaw Convention as Amended by the Hague Protocol*, 26 J. Air L. & Com. 255 (1959).

[7] Art. 22: "In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs."

[8] Art. XI, amending Art. 22: "In the carriage of persons the liability of the carrier for each passenger is limited to the sum of 250,000 francs." In addition, a new paragraph, 4 of Art. 22, permits the court, in accordance with its own law, to award court costs, attorney's fees and other costs incurred if the carrier had not made a timely offer to settle the claim at an amount equal to or exceeding the judgment amount. If implemented by appropriate legislation, this provision could take care of the situation in the United States, where many lawyers take cases on a "contingency" basis, collecting as their fee from one-third to one-half of the damage award, if any, plus expenses. *E.g.*, see Cony, Report on Los Angeles meeting of the Nat'l Ass'n of Claimants' Comp. Att'ys, Wall Street Journal, Aug. 6, 1956, p. 1, col. 1. *Cf.* Reiber, *supra* note 6, at 285, n. 29; Ehrenzweig, *Shall Counsel Fees Be Allowed?*, 26 Cal. S. B. J. 107 (1951).

[9] See Cony, *supra* note 8.

[10] Pursuant to Art. XXIII, para. 2, ratification of the Protocol has the effect of adherence to the Convention.

[11] Dissent by Ravage, Siff, Speiser, in the Report of the New York City Bar Ass'n, *supra* note 6, at 267; Letter from Stuart M. Speiser (for the Nat'l Ass'n of Claimants' Comp. Att'ys) to President Eisenhower, March 15, 1956, ACC Doc. *op. cit. supra* note 1, Attachment 5, at 3;

However, there is no legal possibility of providing an exempting reservation to this article.[12] The alternative, therefore, is not "for or against Article 22," but "for or against the Convention."

A. *Fairness Of The Convention To The Passenger*

A treaty provision can only be evaluated in its natural context; i.e., within the Convention as a whole. Whether the "conciliation of interests" between air carriers and air passengers has gone "wholly to the advantage of the carriers," as Professor Eliescu from the Rumanian People's Republic maintained in 1958,[13] must be decided after consideration of *all* relevant provisions of the Convention.

1. The Convention has established a uniform presumption of liability on the carrier's side (Article 20). Without the Convention, common law liability rules would require the passenger to prove the carrier's negligence unless "the case speaks for itself" (*res ipsa loquitur*), which again could be rebutted by the carrier.[14] The *"res ipsa"* doctrine, doubtful in its application in general,[15] has proven rather unsatisfactory in aviation cases,[16] and would not, in any event, be available to American passengers suing abroad.[17] In 1952, the United Kingdom abandoned this common law liability scheme in the field of air transport, and adopted the rules of the Warsaw Convention as its domestic air law.[18]

2. The Convention protects passengers against lower limitations[19] and contractual waivers of liability.[20] It renders the carrier liable *without*

Wright, *Warsaw Convention's Damages Limitations*, 6 Clev.-Mar. L. Rev. 290 (1957). See also Editorial, *The Unequal Balance*, Wall Street Journal, Aug. 7, 1956, p. 8, col. 1, and Gardner, *So You're Going to Fly to London*, 43 A.B.A.J. 412 (1957).

[12] Reservation suggested by Speiser, letter *supra* note 11, at 5. *But cf.* Art. XXVI of the Hague Protocol, which clearly excludes exemptions of this kind.

[13] Eliescu, Système et limites de la responsabilité civile en droit aérien national et international, Paper delivered to the 5th Int'l Conference on Comparative Law in Brussels 1958, I Gen. Rep. 531, 572 (Brussels 1960).

[14] The amount of evidence required in the United States varies from state to state. *E.g.*, Smith v. Pennsylvania Central Airlines Corp., 76 F. Supp. 940 (1948); see also 92 A.L.R. 653 (1934), cited in ACC Doc., *op. cit. supra* note 1, at 4, n. 2.

[15] *E.g.*, Prosser, *"Res ipsa loquitur" in California*, Selected Topics on the Law of Torts 302, 375 (1953).

[16] Hardman, *Aircraft Passenger Accident Law: A Reappraisal*, 1961 Ins. L.J. 688, 691, n. 14, points out that three prominent experts in aviation negligence litigation come to the general conclusion that although *res ipsa loquitur* is applicable in many cases, the plaintiff would be unwise to rely on it as juries have almost unanimously returned verdicts for the defendant in cases where it had been pleaded; *Cf.* Galiher, *Problems Confronting Trial Counsel in Aviation Cases*, 6 Catholic U. L. Rev. 149, 156 (1957); Lancaster, *Aviation Law*, 17 Texas B.J. 587, 613 (1954); and Speiser, *Aviation Negligence Cases*, 64 Case & Com. 8, 14 (1959). A study of airline cases submitted to juries on the theory of *res ipsa loquitur* revealed that in 22 out of 24 cases verdicts were returned for the defendant. McLarty, *Res Ipsa Loquitur in Aviation Passenger Litigation*, 37 Va. L. Rev. 55 (1957). See also Whitehead, *supra* note 6, at 41; Fenston, Res Ispa Loquitur, Thesis, McGill U. (1953); Fenston, *Res Ipsa Loquitur in Aviation*, 1 McGill L.J. 209 (1953).

[17] See the comparative study of Hjalsted, *The Air Carrier's Liability in Cases of Unknown Cause of Damage in International Air Law*, 27 J. Air L. & Com. 119 (1960).

[18] The Carriage by Air (Non-International Carriage) (United Kingdom) Order, (1952) Statutory Instruments No. 158, (1952) C.L.Y.B. No. 201; see Knauth, Comment, (1952) U.S. & Can. Av. 145.

[19] An often quoted (though out of date) tabulation of national laws limiting recovery to lower amounts than the Warsaw Convention may be found in ICAO Doc. 7450-LC/136, vol. II, Annex VI, Appendix VII (1953).

[20] The uniform "conditions of contract" issued in 1927 by the Vienna Conference of the Int'l Air Traffic Ass'n (IATA) contained sweeping exonerations from liability. The Warsaw Convention forced the Association to modify its uniform contract form in 1930 (Antwerp Conference). See 14 Droit Aérien 516 (1930). The new conditions entered into force at the same time as the Warsaw Convention (Feb. 13, 1933).

limitation if it fails to issue the proper "Warsaw" passenger ticket (Article 3, paragraph 2), and in the case of its or its agents' wilful misconduct (Article 25).[21] It does *not* limit the liability of aircraft and component manufacturers, airport owners and operators, governmental agencies, maintenance organizations, etc.[22]

3. The Convention grants to the passenger a choice among four jurisdictions in which to bring his action: the carrier's domicile, its principal place of business, its place of business through which the contract was made, or at the place of destination.[23] Without the Convention, actions arising from accidents abroad would not only be governed by foreign law,[24] but, according to the wrongful death statutes of several states of the Union such as Illinois[25] and Wisconsin,[26] some American courts would even "close their doors"; i.e., refuse to take jurisdiction, and instead send the plaintiff to some foreign court.[27]

It is noteworthy that out of the 40 American cases dealing with passenger death or injury in international air carriage—37 of which involved the Warsaw Convention—only seven arose from accidents within the United States, six from accidents on the High Seas, and 27 from accidents in the territory of foreign states.

The countries to which plaintiffs—mostly American citizens—would have been referred for their actions, include Portugal,[28] Canada,[29] India,[30] Ireland,[31] Brazil,[32] Scotland,[33] Italy,[34] Greece,[35] Jamaica,[36] Mexico[37] and Liberia.[38]

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[21] Redefined by the Hague Protocol, Art. XIII. See Ulen v. American Airlines, 186 F.2d 529 (D.C. Cir. 1949), 1949 U.S. Av. 338 ($25,000 awarded). Tuller v. K.L.M., 292 F.2d 775 (D.C. Cir 1961) ($350,000 awarded).

[22] Report by New York City Bar Association, *supra* note 6, at 260. See Coultas v. K.L.M., (S.D.N.Y. 1961), 1961 U.S. & Can. Av. 199.

[23] Art. 28, interpreted by American courts as an "implied consent by the carrier to be sued in the forums specified." Berner v. United Airlines, 157 N.Y.S.2d 884 (Ct. App. 1957), 1957 U.S. & Can. Av. 477. The forum requirements of Art. 28 have been interpreted liberally: see, *e.g.*, Winsor v. United Airlines, 159 F. Supp. 856 (Del. D. 1958), 1960 U.S. & Can. Av. 33, ("principal place of business"); In re Waldrep's Estate, (9th Cir. 1958) 1958 U.S. & Can. Av. 534 ("place of destination").

[24] The *"lex loci delicti"* doctrine is constantly applied by some American courts, despite its inadequacy for modern air transport law. *Cf.* Calkins, *supra* note 6, at 255; see also *infra*, text at notes 216 through 223.

[25] Ill. Rev. Stat. (1957), c. 70, § 2.

[26] Wis. Stat. (1949), § 331.03.

[27] See Reed v. Northwest Airlines (N.D. Ill. 1954), 1954 U.S. & Can. Av. 45, distinguishing First National Bank of Chicago v. United Airlines, 342 U.S. 396 (1952), and denying jurisdiction over wrongful death which occurred in Japan.

[28] Garcia v. P.A.A., 84 N.Y.S.2d 408 (App. Div. 1948), 1948 U.S. Av. 521; Indemnity Insurance Co. v. P.A.A., 58 F. Supp. 338 (S.D.N.Y. 1945), 1945 U.S. Av. 46, 52; Ross (Froman) v. P.A.A., 299 N.Y. 88, 13 A.L.R.2d 319, 1949 U.S. Av. 168, 1954 U.S. & Can. Av. 400; Komlos v. Air France, 209 F.2d 436 (2d Cir. 1953), 1953 U.S. & Can. Av. 471; Royal Indemnity Co. v. Air France, 18 F.R.D. 363 (S.D.N.Y. 1955), 1955 U.S. & Can. Av. 358; Supine v. Air France, 100 F. Supp. 214 (E.D.N.Y. 1951), 1951 U.S. Av. 448, 4 Av. Cases 17,691 (1955).

[29] Wanderer v. SABENA, (N.Y.S. 1949), 1949 U.S. Av. 25; Salamon v. K.L.M., 281 App. Div. 965, 1955 U.S. & Can. Av. 80; Ritts v. American Overseas Airlines, 97 F. Supp. 457 (2nd Cir. 1951), 1951 U.S. Av. 101; Goepp v. American Overseas Airlines, 305 N.Y. 838 (1953), 1953 U.S. & Can. Av. 503; Scarf v. T.W.A., 233 F.2d 176 (2d Cir. 1956), 1956 U.S. & Can. Av. 232; In re Waldrep's Estate, (9th Cir. 1958) 1958 U.S. & Can. Av. 534.

[30] Branyan v. K.L.M., Barrows v. K.L.M., Gratke v. K.L.M., Werkley v. K.L.M., 13 F.R.D. 425 (S.D.N.Y. 1953), 3 Av. Cases 18, 219 (1953).

[31] Pekelis v. Transcontinental & Western Air, 187 F.2d 122 (2d Cir. 1950), 1951 U.S. Av. 1; Bergeron v. K.L.M., (S.D.N.Y. 1961), 1961 U.S. & Can. Av. 17; Tuller v. K.L.M., 292 F.2d 775 (D.C. Cir 1961); Coultas v. K.L.M., 1961 U.S. & Can. Av. 199.

[32] Bochory v. P.A.A., (N.Y. App. Div. 1957), 1957 U.S. & Can. Av. 180; In re Hoover's Estate, 11 Pa. D. & C.2d 9 (Pa. Orphan's Ct. 1957), 1957 U.S. & Can. Av. 366.

4. The foregoing would make it clear that the Convention has improved the American passenger's legal position in international air carriage. In exchange, "balances were sought to be struck between passengers and carriers."[39] The principle of limited liability provides such a balance, as Secretary of State Hull indicated in his letter to President Franklin D. Roosevelt.[40] This letter has been quoted with approval by the courts.[41]

B. *Public Policy And Limitations Of Liability*

Even if the principle of limited liability is evaluated independently and out of its treaty context, it is difficult to see why it should be "indefensible morally, sociologically, and economically."[42]

The reference to morals, sociology and economics apparently purports to imply that the limitation is contrary to public policy.

1. Limitations of liability can hardly be contrary to the public policy of those American states which have Workmen's Compensation or Wrongful Death statutes which limit recovery to maximum amounts.[43] However, since the Warsaw Convention as a treaty constitutes part of the "supreme law of the land,"[44] "overriding state law and policies,"[45] the question is one of federal public policy. This issue has been decided by the courts which have held (1) that the limitation provision does not infringe on the constitutional right of Congress to regulate commerce;[46] and (2) that it does not deprive American citizens of their constitutional right to trial by jury.[47]

2. A comparison with the laws of other civilized countries hardly supports the allegation that limited liability is an "immoral" principle. The liability rules of the Warsaw Convention have been adopted with little or no change, for the *domestic* air laws of the following states: the United

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[33] Finne v. K.L.M., 11 F.R.D. 336 (S.D.N.Y. 1951), 1951 U.S. Av. 365.

[34] Sherman v. T.W.A., (N.Y.S. 1960), 1960 U.S. & Can. Av. 297.

[35] Philios v. Transcontinental & Western Air, (N.Y. City Ct. 1953), 1953 U.S. & Can. Av. 479.

[36] DaCosta v. Caribbean International Airways, (S.D.Fla. 1955), 1955 U.S. & Can. Av. 481.

[37] Sheldon v. P.A.A., 74 N.Y.S.2d 578 (App. Div. 1947), 1947 U.S. Av. 546.

[38] Dunning v. P.A.A., (D.D.C. 1954), 1954 U.S. & Can. Av. 70.

[39] Markowitz, J., in Berner v. United Airlines, 4 Av. Cases 17,924, 17,926 (1956).

[40] Sen. Doc. Ex. C., 73rd Cong., 2nd Sess., at 3; 1934 U.S. Av. 240.

[41] Ross v. P.A.A., 1949 U.S. Av. 168, 176; Komlos v. Air France, 1952 U.S. & Can. Av. 310, 320.

[42] Ravage, Siff, Speiser, dissent *supra* note 11, at 268.

[43] Colorado-$25,000, Colo. Rev. Stat. Ann., § 41-1-3 (1953); Connecticut-$25,000, Conn. Gen. Stat. Rev., § 52-555 (supp. 1958); Illinois-$30,000, Ill. Rev. Stat., c. 70 § 1, 2 (1959); Kansas-$25,000, Kan. Gen. Stat. Ann. § 60-3203 (1949); Maine-$20,000, Me. Rev. Stat. Ann., c. 165, § 10 (1954); Massachusetts-$20,000, Mass. Ann. Laws, c. 229, § 6(E) (1955); Minnesota-$25,000, Minn. Stat. Ann., § 573.02 (1947); Missouri-$25,000, Vernon's Ann. Mo. Stat., § 537.090 (1949); New Hampshire-$25,000, N.H. Rev. Stat. Ann., § 556.13 (1955); Oregon-$20,000, Ore. Rev. Stat., § 30.020 (1959); South Dakota-$20,000, S.D. Code, § 37.2203 (1939); Virginia-$30,000, Va. Code. Ann., § 8-636 (1950); West Virginia-$20,000, W.Va. Code Ann., § 5475 (1955); Wisconsin-$25,000, Wis. Stat. Ann., § 331.04 (1958); See Oleck, Damages to Persons and Property, § 198 A (rev. ed. 1961); Silver, *Death Damages and Conflict of Laws*, 10 Clev.-Mar. L. Rev. 461 (1961).

[44] U.S. Const. art. VI, clause 2.

[45] Garcia v. P.A.A., 1945 U.S. Av. 39, 43, citing Wyman v. P.A.A., 293 N.Y. 878 (1944), and U.S. v. Pink, 315 U.S. 203, 230; Berner v. United Airlines, 4 Av. Cases 17,924, 17,925 (1956), citing Wyman v. P.A.A., *supra* and Komlos v. Air France, 209 F.2d 436 (2d Cir. 1953).

[46] Indemnity Insurance Co. v. P.A.A., 18 F.R.D. 363 (S.D.N.Y. 1955).

[47] Pierre v. Eastern Airlines, 152 F.Supp. 486 (N.J.D. 1957), 1957 U.S. & Can. Av. 431.

Kingdom,[48] France,[49] Belgium, Luxemburg, Greece and Switzerland.[50] The principles of the Convention, including what is alleged to be "so basically bad a principle as limitation of liability,"[51] have become a model for national legislation throughout the world, and were incorporated in the domestic air law of such countries as Norway, Sweden, Denmark,[52] Austria, Germany,[53] the Netherlands, Italy, Argentina, Brazil, Uruguay, and Mexico.[54]

Limitations of liability have been embodied in other international conventions on air law, maritime law, and nuclear energy law.[55] The only official declaration of a public policy *against* limitation of liability in international air transport comes from the so-called (East) German Democratic Republic:

> [T]he principle of limitation of liability to arbitrary maximum amounts is—at least with respect to personal damages—contrary to the socialist principle that the damage actually caused must be fully compensated.[56]

3. If there is such a thing as "sociological" justification of *unlimited* liability—and of its consequences in the form of higher transportation fares—it is certainly not free from objections. In the United States, the average net recovery by passengers against air carriers in cases where the Warsaw Convention was not applicable, has been estimated at $15,000 in 1956,[57] even lower than the Hague limits. The only social group which would benefit from unlimited liability—at the expense of all other paying passengers—is the group of "above-average" travellers (higher earnings, higher life expectancy) who could best afford to obtain individual insurance for their exceptional risk.[58]

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[48] *Supra* note 18.

[49] Loi No. 57-259 sur la responsabilité du transporteur au cas de transport aérien, March 2, 1957; Journal Officiel (March 3, 1957).

[50] See Guinchard, *L'influence de la convention de Varsovie sur les règles de droit interne relatives à la responsabilité du transporteur aérien*, 11 Rev. Franc. Droit Aérien 189 (1957).

[51] Ravage, Siff, Speiser, dissent *supra* note 11, at 268.

[52] *Cf.* Nylen, *Scandinavian Cooperation in the Field of Air Legislation*, 24 J. Air L. & Com. 37 (1957).

[53] Luftverkehrsgesetz, 1943 Reichs-Gesetzblatt 1.69, as amended to 1959. See Rinck, *Système et limites de la responsabilité en droit aérien international et national*, Paper delivered to the 5th Int'l Conference on Comparative Law in Brussels 1958, 7 Z. Luftrecht 298 (1958), English summary at 311.

[54] See Guinchard, *supra* note 50.

[55] Rome Convention (1952) on Damages Caused by Foreign Aircraft to Third Parties on the Surface, ICAO Doc. 7364, 310 U.N.T.S. 181, 19 J. Air L. & Com. 447 (1952); Brussels Convention (1924 "Hague Rules," rev. 1957) Relating to the Limitation of the Liability of Owners of Sea-Going Ships, 59 Droit Maritime 580 (1957), 24 Rabels Z. 742 (1959); Paris Convention (1960) on Third Party Liability in the Field of Nuclear Energy; see 27 J. Air L. & Com. 376 (1960).

[56] Damm, *Hinweise zur Neufassung des Warschauer Abkommens*, (1959) Nachrichten für die zivile Luftfahrt der D.D.R. (No. 8) 88, 89 (translation supplied); Notwithstanding this declaration of principles, East Germany followed the example of the Soviet Union, and for political reasons ratified the Hague Protocol on April 3, 1959; see 1959 Gesetzblatt der D.D.R. I.521. However, see protest at the Hague Conference 1955, ICAO Doc. 7686-LC/140, I Minutes 19, 26; II 75; *cf.* Riese, *supra* note 6, at 6, n. 1; As to the similar Chinese case, see 1960 U.S. & Can. Av., Treaty Data xii: "The Government of the United States of America does not recognize the so-called Peoples Republic of China and considers the notification as having no legal effect." (notification on adherence to the Warsaw Convention).

[57] Letter from Whitehead, Director U.S. Aviation Underwriters, to Air Coordinating Committee (Feb. 19, 1957), see ACC Doc. *supra* note 1, at 11, n. 10. *But cf. infra* note 209.

[58] Drion, Limitation of Liabilities in International Air Law 23 (The Hague 1954); Reiber, *supra* note 6, at 285.

4. There remains the argument of the economic inadequacy of the limitations in the United States; i.e., that plaintiffs before an American court should be entitled to recovery adequate to the American standard of living, and uninhibited by an international average.

It must be admitted that efforts to set uniform amounts of *recovery* are in the borderland of feasible international unification.[59] Although the monetary value of 250,000 gold francs (Article 22, paragraph 5 of the Hague Protocol) may be the same in all member countries, this standard does not take into account differences in the national average income per capita which determines the standards of damage compensation.[60] Not only the so-called under-developed countries, but also Western Europe lags far behind the United States and Canada in this respect.[61]

C. *Alternatives To Withdrawal*

The economic argument seems to be the essential motif of those urging the United States to withdraw from the Warsaw Convention and to "replace it" by national legislation.[62]

However, it is not correct to say that "the duly elected representatives of the American people can draft their own legislation which would make the [Warsaw Convention] benefits available in a constitutional manner."[63] Without the Convention, national legislation cannot grant to American plaintiffs a choice of jurisdiction including foreign courts. Without the Convention, it cannot protect American citizens before foreign courts, who will then apply their own laws instead of treaty provisions. On the other hand, U.S. legislation for higher limits or for no limitations at all, will attract foreign plaintiffs—not to fly on American flag airlines—but to sue in American courts.

1. As another remedy, it has been proposed to raise the limits of liability of the Hague Protocol once more, to an amount adequate to the standards of damage compensation in this country. Since there does not appear to be much chance to reach international agreement on higher limits,[64] a unilateral increase of the limitation amounts, based on Article 22, paragraph 1 of the Convention, is considered.[65]

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[59] "If there is any field in which unification of the law on a world wide basis would be inappropriate, it is the field of the amount of damages to be paid in case of death or injuries. For in few areas local views and circumstances of a social and economic character are of such importance." Drion, *op. cit. supra* note 58, at 42.

[60] A rule of thumb for the courts' calculation of damages for wrongful death is to multiply the victim's annual income with years of life expectancy; see Tuller v. K.L.M., 292 F.2d 775 (D.C. Cir. 1961).

[61] In a comparison of American and European air transport, Dutoit, L'Aviation et L'Europe 13 (Lausanne 1959), points out the difference between the annual per capita income in the United States ($2,300) and in Europe ($770).

[62] Letter from Speiser to President Eisenhower, *supra* note 11, at 4: "In shackling our citizens to the economic and moral standards of other nations, many of them backwards, undemocratic or even totalitarian, the Warsaw Convention affords a perfect example of the evils at which the Bricker Amendment is aimed."

[63] *Ibid.*, at 5.

[64] At the Hague Conference, the U.S. delegation had proposed to triple the Warsaw limits, but doubling of the limits was already considered a "generous concession" by other delegations. Reiber, *supra* note 6, at 282.

[65] Relying on Art. 22 of the Convention (allowing for higher limits of liability by special agreement between carriers and passengers), Caplan, in 1961 J. Bus. L. 282, says: "If carriers voluntarily agreed to offer higher limits (or even no limits at all) or if British carriers were persuaded to do so by the Minister with the authority of Parliament, there is no need to fear chaos."

If higher limits were imposed by one state on both national and foreign carriers, other states would presumably interpret this as a violation of the Warsaw Convention.[66] On the other hand, if the increased amounts would apply to national carriers only, these carriers are likely to protest against being "penalized" in their competition with foreign carriers.

2. There is, however, an alternative way of dealing with the problem of recovery on a national scale, which has already been followed by several countries. By statutory implementation of the Convention, the bulk of passengers' compensation can be separated entirely from the issue of carriers' liability. The Convention cannot be *replaced* by national legislation—but it can be *implemented.*

II. The Case for Statutory Implementation

The Warsaw Convention is by no means perfect. Either deliberately or by omission, a number of questions were left open which, according to the background drafting documents, would presumably be resolved by national law.[67]

A. *Need For Legislation*

Foreign states have made ample use of this privilege to enact statutes implementing the Convention.[68] Although American courts have emphasized the need for implementing legislation, too,[69] and sometimes have even wrongly assumed that it had already been passed,[70] no such steps have been taken in the United States. As a result, American plaintiffs are being denied rights under the Warsaw Convention which plantiffs in other countries have long since obtained.[71]

The point, however, should be clear: *This is not the fault of the Convention, but purely and simply the failure of Congress to enact the necessary legislation.*

Among the numerous matters which could be settled by implementing legislation are the following: cause of action,[72] persons who have a right

[66] This was the view of the majority of the delegates at the ICAO Legal Committee's 9th Session, Rio de Janeiro (1953), see ICAO Doc. 7450-LC/136, vol. I, 163-165. *But cf.* the statements by the British delegate, Sir Richard Wilberforce, *ibid.*

[67] See, *e.g.*, Minutes of the Warsaw Conference, *supra* note 3, at 44, 91, 115, 137 ff.

[68] See British Carriage by Air Act, (1932) 22 & 23 Geo. 5, c. 36; 1939 U.S. Av. 303, 1947 U.S. Av. 649; German Durchführungs-Gesetz zum Warschauer Abkommen, Dec. 15, 1933; 1933 Reichs-Gesetzblatt I.1079; Irish Air Navigation and Transport Act, Aug. 14, 1936, No. 40 (as amended to March 18, 1959, No. 1), see Strauss, *supra* note 2, at 725, 843; Dutch Air Transport Act, Sept. 10, 1936, 1936 Staatsblad No. 523; Swedish Lag om befordran med luftfartyg, March 5, 1937, No. 73, 1937 Svensk Författningssamling 189; Canadian Carriage by Air Act, 1952 Rev. Stat. Can., c. 45; Australian Civil Aviation (Carriers' Liability) Act (1959), Royal Assent April 21, 1959; see Strauss, *supra* note 2, at 121; The Hague Protocol has been implemented by the Australian Act and by the new British Carriage by Air Act (1961), Royal Assent June 22, 1961. See Caplan, 1961 J. Bus. L. 170.

[69] Clancy, D.J., in Choy v. P.A.A., (S.D.N.Y. 1941), 1942 U.S. Av. 93, 98; Schreiber, J., in Wyman v. P.A.A., (N.Y.S. 1943), 1943 U.S. Av. 1, 4.

[70] Ross v. P.A.A., (N.Y.S. 1953), 4 Av. Cases 17,171, 17,172 ("the Warsaw Convention and the statute pursuant thereto"); Pierre v. Eastern Airlines, (N.J.D. 1957), 5 Av. Cases 17,515 ("with congressional implementation, it entered into force. . . .").

[71] Denying plaintiff a statutory cause of action arising from Warsaw Convention: Choy v. P.A.A., *supra* note 69; Wyman v. P.A.A., *supra* note 45; Komlos v. Air France, *supra* note 28; Noel v. Linea Aeropostal Venezolana, 247 F.2d 677 (2nd Cir. 1957), 1957 U.S. & Can. Av. 274; Fernandez v. Linea Aeropostal Venezolana, 156 F. Supp. 94 (S.D.N.Y. 1957), 1957 U.S. & Can. Av. 369. *But cf.* the British, Irish, Canadian and Australian Acts, *supra* note 68, granting the plaintiff a statutory right of action; see also *infra*, text at notes 215 through 223.

[72] Art. 24, para. 1: ". . . any action for damages, *however founded*, . . ." (Emphasis supplied.)

to sue,[73] extent of damages,[74] standards of care,[75] liability for hand-baggage and personal objects,[76] and other items.[77]

While it would be highly desirable to settle as many of these matters as possible, we are concerned here only with those directly affecting the passenger's right of recovery.

It is submitted that implementing legislation can provide air passenger compensation which is harmonious with both the Warsaw Convention *and* national economic standards. This is illustrated by a comparative study of similar compensation systems here and abroad.

B. *Comparative Survey Of Passengers' Compensation Schemes*

It will be useful first to enumerate the various compensation schemes for air passengers which hitherto have been outlined in theory or adopted in practice.

1. *Plans for an International Air Passenger Compensation System*

As early as 1922, Professor Ripert proposed an international system of compulsory accident insurance for the benefit of air passengers.[78] Similar proposals were discussed during the following years in the *Comité Juridique International de l'Aviation,* in the *Comité International Technique d'Experts Juridiques Aériens* and in the International Air Traffic Association.[79]

After the Warsaw Convention was concluded in 1929, Kattal in 1931 urged addition of a provision relating to compulsory passenger accident insurance.[80] When in 1948 the issue of compulsory insurance was raised again,[81] the ICAO Legal Committee decided to leave it to national regulation.[82] New proposals for compulsory liability insurance in 1953[83] led to a resolution at the Hague Conference in 1955, calling for a study of such a system.[84]

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[73] Art. 24, para. 2: ". . . *without prejudice to the question* as to who are the persons who have the right to bring suit and what are their respective rights." (Emphasis supplied.)

[74] Whether the "damages sustained" include "moral damages," "remote" damages, litigation expenses (*cf.* note 8), etc.

[75] Determination of "all necessary measures to avoid the damage" (Art. 20).

[76] Art. 18 only settles the carrier's liability for checked baggage.

[77] Some of the gaps of the Convention, such as individual liability of the carrier's servants and agents, definition of wilful misconduct, liability in case of air charter agreements, have been filled by the Hague Protocol and by the recent Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed at Guadalajara on Sept. 18, 1961.

[78] 5th Meeting of the Comité Juridique International de l'Aviation in Prague 1922, see 9 Revue Juridique Internationale de la Locomotion Aerienne 226 (1925).

[79] *E.g.*, see Bastaki, Report on Compulsory Passenger Insurance, IATA 21st meeting in Rome 1929, 13 Droit Aérien 664 (1929). See also Coquoz, Droit Prive International Aérien 77 (Paris 1938). *Cf.* Vaicoussis, Aviation Insurance: Passengers and Third Parties on the Surface, Thesis, McGill U. (1954); Lafleur, Aviation Insurance, Paper delivered to the Institute of Air and Space Law, McGill U. (1961).

[80] Proposal "designed to complete the Warsaw Convention of October 12, 1929, by a supplementary article, providing that the carrier who has contracted for an accident policy for the benefit of the passenger in the amount of 125,000 French francs with one of the insurance companies nominated for the purpose by his government, shall be discharged of all liability towards the passenger, as regulated by the said Convention, except in the case provided for in Article 25 thereof." Kaftal, *Liability and Insurance,* 5 Air L. Rev. 157, 274 (1934).

[81] Meyer, speaking for the Int'l Law Ass'n, Geneva meeting of the ICAO Legal Committee (1948), see ICAO Doc. 6014-LC/111, at 71.

[82] 3rd Session, Lisbon (1948), ICAO Doc. 6024-LC/121, at 239; 4th Session, Montreal (1949), ICAO Doc. 6027-LC/124, at 275.

[83] 9th Session, Rio de Janiero (1953), ICAO Doc. 7450-LC/136, vol. II, 125.

[84] Resolution B, Final Act, see Minutes of the Hague Conference, *supra* note 2, II, 30: "The

2. *Contractual Passenger Accident Insurance by Air Carriers*

While most international airlines presently carry liability insurance,[85] there are also four carriers who voluntarily offer personal accident insurance, included in the price of the passenger ticket. These are Swiss Air,[86] Air France,[87] Union Aeromaritime de Transports (UAT), and Transports Aeriens Intercontinentaux (TAI).[88]

The International Air Transport Association seems to disapprove the offer of gratuitous accident insurance to air passengers, as an indirect "under-cutting" of its price-cartel.[89] Following certain IATA-Resolutions, Swiss Air had to change the terms of its personal accident insurance into "admitted liability insurance";[90] the French carriers do not publicize their insurance policy.[91]

3. *Statutory Air Passenger Insurance*

There are two groups of states where air carriers are subject to compulsory insurance for passenger damages:

a. Brazil,[92] Mexico[93] and Argentina[94] require proof of liability insurance, or similar guarantees, for all damages likely to be caused by aircraft to

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Conference . . . recommends to the Council of the International Civil Aviation Organization that it instruct the Secretariat and Legal Committee (a) to make a study of a system of guarantees for the payment of compensation in the case of liability of the air carrier, in pursuance of the Warsaw Convention; and, if it is considered advisable, (b) to ask the States for information concerning the provisions of national legislations which have adopted such a system, as well as their opinion as to the possibility of extending the system to international air transport, by means of compulsory insurance, a bank guarantee or a cash deposit."

[85] Goodfellow, speaking for the International Union of Aviation Insurers at the Hague Conference (1955), Minutes *supra* note 2, vol. I, at 179: "The air carrier normally insures his liability not only up to the Convention limits, but for a considerably larger sum, to meet the possibility of adverse verdicts under Article 25."

[86] Coverage is to 36,000 Swiss Francs (approx. $9,000) in case of death or permanent disability, and 25 Francs (approx. $6) per day of temporary disability up to one year. See Bodenschatz, *Rechtsprobleme der obligatorischen Passagierunfallversicherung (Opuv)*, 8 Z. Luftrecht 230, 236 (1959). In general, see Kubli, Luftfahrtversicherung unter besonderer Berücksichtigung des Luftpools (Zürich 1952); Guldimann and Vogel, *Die Luftfahrtversicherung in der Schweiz*, 2 Z. Luftrecht 237 (1953); Vogel, *Luftfahrtversicherung in der Schweiz*, 1955 Zeitschrift des Schweizer Pool für Luftfahrtversicherung 16.

[87] Coverage is to 34,800 (New) French Francs (approx. $7,000) in case of death or permanent disability, and 72 Francs (approx. $14) per day of temporary disability up to 200 days. See Bodenschatz, *supra* note 86, at 235. In general, see Le Goff, *L'assurance aérienne*, 8 Revue Generale de Droit Aérien 7 (1939); Lemoine, *Assurance des passagers sur les lignes commerciales aériennes*, 8 Rev. Gen. Droit Aérien 177, 196 (1939); Homburg, *Les assurances aériennes*, 9 Revue Generale de L'Air 415, 633 (1946), 11 Rev. Gen. Air 41, 310 (1948); François *L'assurance des risques aériens*, 13 Rev. Gen. Air 3 (1950); Institut Français du Transport Aérien, *L'assurance des risques aériens*, Note de Travail No. 208 (1951); Picard, *Responsabilité et assurance dans le transport aérien*, 24 Revue Generale des Assurances Terrestres 217 (1953).

[88] See Bodenschatz, *supra* note 86, at 235 ff.

[89] Similarly, in the United States, attempts at supplying free accident insurance to passengers ("guest voluntary settlement") have apparently been considered as "unlawful rebate" by other competitors. See Ehrenzweig, "Full Aid" Insurance for the Traffic Victim 56, n. 152 (1954).

[90] Vogel, *supra* note 86, at 66.

[91] The Air France insurance policy is printed only in the interne Manuel de Passage, c. B 11/4.01; for a translation see Weimar, *Die obligatorische Fluggastunfallversicherung gemäss 29g LVG*, 2 Z. Luftrecht 288, n. 28 (1953).

[92] Code of the Air, June 8, 1938, No. 483, Diario Oficial (June 27, 1938), art. 109 ff. Translation see Strauss, *op. cit. supra* note 2, at 268, 281. In general see François and Saporta, *Les risques aériens et leur assurance: Brésil*, 15 Rev. Gen. Air 203 (1952), 16 Rev. Gen. Air 3 (1953).

[93] Decree Amending Book IV of the Law of General Means of Communication, Diario Oficial 6 (Jan. 23, 1950), art. 343. Translation see Strauss, *op. cit. supra* note 2, at 941, 952.

[94] Código Aeronàutico, July 15, 1954, No. 14,307, Boletin Oficial (August 18, 1954), art. 171. Translation see Strauss, *op. cit. supra* note 2, at 5, 24.

passengers, persons or property on the ground.[95] In addition, Brazil and Argentina require proof of personal accident insurance for the benefit of flying personnel.[96]

b. Whereas most European countries also require liability insurance or similar guarantees for third-party damages, four countries have imposed by statute "group accident insurance" for the benefit of air passengers. These are Italy,[97] Germany,[98] Austria,[99] and Spain.[100]

4. *Proposals for Air Passenger Insurance in the United States*

a. Uniform state legislation on aviation liability, including passenger accident insurance, was first proposed in 1934 by a study group for the Uniform Law Commissioners, consisting of Dean Wigmore, Professor Goodrich, Professor Knauth, and other scholars;[101] but the plan

[95] Compulsory liability insurance was also stipulated in § 29 of the pre-war German Aviation Act (Luftverkehrs-Gesezt); see 1922 Reichs-Gesetzblatt I. 681, 1936 R. G. Bl. I. 653, 1938 R. G. Bl. I. 1246. It has since been replaced—with respect to passengers—by group accident insurance (*infra* note 98). *Cf.* Bodenschatz, *supra* note 86, at 242.

[96] Brazilian Code, art. 115; Argentinian Code, art. 170. In October 1926, the Air Transport Committee of the International Chamber of Commerce had proposed an international convention on compulsory accident insurance for all flying personnel. See 1 Zeitschrift für das Gesamte Luftrecht, Supp. 127 (1928).

[97] "The Operator of regular airlines must insure each passenger against the flight accidents for the sum of 160,000 Lire. In default, the Operator is bound for the indemnities and amounts which would be due by the Underwriter, within the limits foreseen by the provisions on the obligatory insurance of passengers." Codice della Navigazione, March 30, 1942, No. 327, Gazzetta Ufficiale No. 93, (April 18, 1942), art. 941. Translation, Manca, The Italian Code of Navigation 358 (Milan 1958). Today, coverage is up to 5,200,000 Lire; see Bodenschatz, *supra* note 86, at 234. In addition, the insurance covers costs of passenger salvage and rescue up to 2,000,000 Lire (Art. 999). In general see Ferrarini, *Le assicurazioni nel codice della navigazione*, 8 Assicurazioni I. 268 (1941); Giannini, *Sulle assicurazioni aeronautiche*, 19 Assicurazioni I. 210 (1952); Fiorentino, *Le assicurazioni aeronautiche obbligatorie*, 19 Assicurazioni I. 303 (1952); Donati, *Le assicurazioni per la responsabilita dell'esercente aereo*, 21 Rivista del Diritto della Navigazione I. 112 (1955); Marino, *Aspetti e problemi delle assicurazioni aeronautiche italiane*, 24 Assicurazioni I. 168, 262 (1957), in Study in Onore D'Antonio Ambrosini (Milan 1957); Longoni, *Rassegna di dottrina e giurisprudenza in tema di assicurazioni sul trasporto marittimo, aereo e terrestre di merci*, 27 Assicurazioni I. 417, 446 (1960).

[98] "Air carriers shall be under a duty to insure passengers against accidents (Article 44). The minimum amount of such insurance shall be thirty-five thousand German Marks for death or permanent total disability. Any claim for damages shall be considered satisfied to the extent that it is paid by such accident insurance." Federal Aviation Act (Luftverkehrs-Gesetz), Jan. 10, 1959, 1959 Bundes-Gesetzblatt I. 9, § 50. Translation Strauss, *supra* note 2, at 450, 467. The "obligatory passenger accident insurance" was first introduced in 1943; see 1943 Reichs-Gesetzblatt I. 69, § 29(g). In general see Döring, Die Luftversicherung: Entwicklung, Recht und Technik, 42 Veröffentlichungen des Deutschen Vereins für Versicherungswissenschaft (Berlin 1928); Wussow, *Insassenunfallversicherung und Sozialversicherungsträger*, 1944 Deutsches Recht 564; Wimmer, *Haftung und Versicherung im Passagierluftverkehr*, 7 Versicherungswirtschaft No. 11 (1952); *id.*, *Die deutsche Luftfahrtversicherung und ihre Probleme in der Nachkriegszeit*, 2 Z. Luftrecht 213 (1953); *id.*, *Deutsches Luftversicherungsrecht, zugleich in internationaler Betrachtung*, in Beiträge zum Internationalen Luftrecht (Festschrift für Alex Meyer) 144 (Düsseldorf 1954); Schmetzke, Luftfahrt und Versicherung, (Berlin 1954); Weimar, *supra* note 91; Bodenschatz, *supra* note 86.

[99] Pursuant to the Austrian Federal Aviation Act (Luftfahrt-Gesetz), of Dec. 2, 1957, 1957 Bundes-Gesetzblatt 1403, § 151, para. 1, the relevant provisions of the 1943 German Aviation Act (*supra* note 98) apply, with the insurance coverage raised to 120,000 Austrian Schillings. Translation see Strauss, *supra* note 2, at 218, 256.

[100] Ley de Navegacion Aèrea, Boletin Oficial (July 21, 1960), c. 14, provides for coverage to 200,000 Pesetas in case of death, and from 50,000 to 200,000 Pesetas in case of bodily injury. See Tapia Salinas, *La Ley Espanola de Navegacion Aèrea*, 69 Ciencia Aeronautica 6 (1960). The Spanish railroads' obligatory passenger accident insurance of 1929 was first extended to road and air transport in 1941, implemented in 1942 by regulations of the Treasury Dept. (Ministerio de Hacienda). In general, see François and Saporta, *Les assurances aériennes en Espagne*, 13 Rev. Gen. Air 855 (1950).

[101] The proposed Uniform Aviation Liability Act was based on strict liability, limited "to a fixed schedule like a personal accident policy if the carrier provided such insurance for direct benefit of the passenger." See Knauth, *Aviation Law and Maritime Law*, 35 Chicago B. Record

was put off "until after the war."[102] After a new proposal by Kuehnl in 1948,[103] the National Conference of Commissioners on Uniform State Laws in 1953 drafted a "Uniform Aircraft Financial Responsibility Act,"[104] which was similar to statutes enacted in Illinois[105] and Indiana.[106]

b. Federal legislation on this subject was urged by Bukler in 1940.[107] The Sweeney Report to the Civil Aeronautics Board in 1941[108] concluded that a system of limited liability coupled with compulsory insurance, established by federal legislation, would be the most feasible and desirable solution of the aviation liability problem, and its adoption would be in the best interests of aviation and of the general public. As an alternate program, it proposed to vest a federal agency with regulatory power to require aircraft operators to carry "admitted liability insurance" with respect to revenue passengers, persons and property on the ground.[109] From 1943 to 1951, several unsuccessful bills were introduced in congress to this effect.[110] In 1952, the Civil Aeronautics Board issued draft "Insurance Requirements for Air Carriers and Foreign Air Carriers";[111] but after strong opposition from the air transport industry[112] the draft was withdrawn.[113] Among proposals from legal writers were Abramson's plan for a "Federal Aircraft Financial Responsibility Act" in 1953,[114] Ehrenzweig's "Full Aid Insurance" plan in 1954,[115] and Hardman's plan for compulsory

199, 207 (1954); see also 1938 National Conference Uniform Aviation Liability Act, 11 J. Air L. 726 (1940).

[102] Knauth, *supra* note 101, at 207.

[103] Kuehnl, *Uniform State Aviation Liability Legislation*, 1948 Wis. L. Rev. 356.

[104] See Abramson, *Aircraft Liability Insurance—Voluntary or Compulsory?*, 1953 Proceedings of A.B.A. Section of Insurance Law 53, 62.

[105] Ill. Rev. Stat. (1951).

[106] Acts of 1951, c. 267, as amended by Acts of 1953, c. 58.

[107] Bukler, *Limitation of Air Carrier Tort Liability and Related Insurance Coverage—A Proposed Federal Air Passenger Liability Act*, 11 Air L. Rev. 262, 291 (1940).

[108] "Study of the Proposed Aviation Liability Legislation"; see Sweeney, *Is Special Aviation Liability Legislation Essential?*, 19 J. Air L. & Com. 166, 317 (1952). *Cf.* discussion of the plan by Ryan, 1942-43 Proceedings of A.B.A. Section of Ins. L. 202; Gambrell, *Air Transport Insurance* 1943-44 Proceedings of A.B.A. Section of Ins. L. 244.

[109] "This insurance would be payable directly to the injured party or his representative upon proof that his injury was directly due to the operation of the particular aircraft in question, regardless of the circumstances of impact, upon condition that such recipient excute a valid release of all claims against the insured and against all persons acting on his behalf. Under such a statute, the injured party, or his representative, would have the option of rejecting the accident insurance and of suing at common law for an unlimited amount of damages." Sweeney, *supra* note 108, at 325.

[110] H. R. 1012, 3420, 3491, 5020 (78th Cong.); H.R. 532 (79th Cong.); H. R. 8126 (81st Cong.); H. R. 7270 (82nd Cong.). See Shaddle, *Aviation Insurance in Light of Pending Legislation*, 1943-44 Proceedings of A.B.A. Section of Ins. L. 249; Smith, *Pending Federal Aviation Insurance Legislation*, 1946 Proceedings of A.B.A. Section of Ins. L. 137; Nicholson, *Trends in Aviation Insurance*, 25 Mich. St. B.J. 52 (1946).

[111] Draft Release No. 51, (April 30, 1952), 17 Fed. Reg. 4220; Draft Release No. 58 (Dec. 16, 1952), 17 Fed. Reg. 11,700. The draft provided, *inter alia*, for compulsory liability insurance or similar guarantees up to $25,000 per passenger (§ 271.9).

[112] See Tipton and Bernhard, *Compulsory Insurance for Air Carriers*, 20 J. Air L. & Com. 58 (1953).

[113] CAB Release No. 53-31 (June 10, 1953): "[B]ecause of possible statutory limitation, and because the facts indicate that air carriers in general now have adequate coverage for insurance, [the Board] will not issue a regulation requiring all carriers to show financial responsibility with respect to adequate insurance coverage to cover possible claims arising out of injury or damage to passengers and to persons on the ground." See Abramson, *supra* note 104, at 53.

[114] Abramson, *supra* note 104.

[115] Ehrenzweig, *op. cit. supra* note 89. Although primarily designed for road traffic, the plan contained a comparative study of foreign air laws (at 26). It proposed "full aid" insurance under a fixed schedule, keyed to minimum needs of low income groups, accompanied by legislation relieving properly insured drivers from all tort liability. See also Ehrenzweig, *"Full Aid" Insurance*

liability insurance and absolute limited liability of air carriers, in 1961.[116]

c. Among comments on ratification of the Hague Protocol, received by the President's Air Coordinating Committee in 1956-1957, were suggestions for passenger accident insurance by Calkins[117] and by the New Jersey State Bar Association.[118]

C. *Compensation And Liability*

The various compensation systems for air passengers may be grouped in a few broad categories, according to whether they are based on, a basis for, a substitute for, or independent of, the air carrier's liability.

1. *Liability Insurance and Financial Responsibility*

In order to avoid the "shock effect" of individual judgments,[119] air carriers may either build a special claims' fund (self-insurance),[120] or "contract out" of the liability imposed on them under national laws and under international conventions, by taking liability insurance.[121] The costs of this insurance or funding—compensation based on liability—are part of an airline's ordinary business costs and, as such, are always spread on to the users.

The idea of making this kind of insurance compulsory ("financial responsibility") was inspired by automobile accident law,[122] and has been widely accepted in the field of aircraft liability for damages to third parties on the surface.[123] The same system has been extended to the field of passenger damages in three Latin-American countries,[124] in some international proposals,[125] and in some unsuccessful legislative and administrative attempts in the United States.[126]

for the Traffic Victim, 43 Calif. L. Rev. 1 (1955); *id., Ersatzrecht-Versicherung,* in Internationales Versicherungsrecht (Festschrift für Albert Ehrenzweig, Sr.) 9 (Möller ed. 1955).

[116] Hardman, *supra* note 16.

[117] See ACC Doc., *supra* note 1, Attachment 3, at 3: "Conceivably there could be a system with no exclusions [from risk], and the additional cost of insurance coverage passed on to the users. (Switzerland has such a system, and that country is neither "socialistic" nor anti-insurance!)."

[118] See ACC Doc., *supra* note 1, Attachment 2: Urging that legislation be passed "requiring every air carrier who claims coverage of the Convention on tickets sold and delivered in the United States to offer for sale with such tickets a policy of insurance extending coverage for liability for injury or death to full indemnity or to the face value stated in excess of the coverage provided under the amended Convention, unless the passenger waives, in writing his right to purchase such additional coverage."

[119] James, *Accident Liability Reconsidered: The Impact of Liability Insurance,* 57 Yale L.J. 549, 550 (1948).

[120] *E.g.,* Trans Canada Airlines has such a fund.

[121] Most certificated carriers in the United States carry such insurance, see Tipton and Bernhard, *supra* note 112, at 75; CAB Release, *supra* note 113.

[122] *Cf.* Abramson, *supra* note 104, at 62. Nearly all countries have now introduced compulsory automobile liability insurance; see Ehrenzweig, *op. cit. supra* note 89, at 46. The question posed by Kuvin, *A Critique of Plans for Auto Accident Compensation,* 1961 Ins. L.J. 334, 348, whether the European states still "keep the compensation system," would appear to be answered by the European Convention Relating to Compulsory Liability Insurance of Automobiles, signed at Strasburg (1959); see 26 Assicurazioni II. 15 (1959). In Massachusetts, New York, and North Carolina, there exist similar statutes; other North-American states have so-called "Financial" or "Safety Responsibility" Laws (Highway Victims Indemnity Acts), which however offer a lesser degree of protection to victims of the driver's first accident. See, *e.g.,* Grad, *Recent Developments in Automobile Accident Compensation,* 50 Col. L. Rev. 300, 305 (1950).

[123] *Cf.* Rome Convention (1952), *supra* note 55, and national air laws in Western Europe (*e.g.,* German Federal Aviation Act of 1959, *supra* note 98, § 43) and Latin-America (*e.g.,* Brazilian, Mexican, Argentinian laws, *supra* notes 92, 93, 94).

[124] See *supra* notes 92, 93, 94.

[125] See Brazilian and Argentinian proposals at the Hague Conference; Minutes, *supra* note 2, vol. I, at 258; vol. II, at 145, 217.

[126] See text at notes 104, 111, 114, 116.

2. *Passenger Accident Insurance*

Instead of insuring its own liability risk, an air carrier may take group insurance for the accident risk of its passengers. This type of "passenger accident insurance," also called "automatic accident insurance" or "admitted liability insurance,"[127] was first introduced more than 30 years ago by German, French, and Swiss airlines,[128] and subsequently became mandatory in a number of European countries.[129] After World War II, the United States government reportedly also imposed passenger accident insurance on British carriers using U.S. military airports in Britain.[130]

Mandatory passenger accident insurance is similar in principal to Workmen's Compensation.[131] In both fields, however, various compensation systems are conceivable, which differ particularly when it comes to the question of liability:

a. Passenger accident insurance may be coupled with strict liability (liability regardless of fault, enterprise liability, liability for risk, absolute liability),[132] as in the new Spanish Air Law of 1960,[133] or as proposed elsewhere.[134]

b. Another group of proposals[135] would *a priori* replace the carrier's

[127] Sweeney, *supra* note 108, at 325; Swiss Air policy, text *supra* at note 90.

[128] See Döring, *supra* note 98, at 121 (Lufthansa, in 1926); Kaftal, *supra* note 80, at 275 fn. (CIDNA, France); Lemoine, *supra* note 87, at 196 (Air France); Arndt, Die Haftung des Luftfahrzeughalters aus Transportvertrag unter besonderer Berücksichtigung ihrer Ablösung durch die obligatorische Unfallversicherung 39, n. 138, Thesis, Zürich (1932) (Swiss Air).

[129] See the statutes of Italy, West-Germany, Austria, and Spain, *supra* notes 97 through 100. Although Swiss Air is not required by law to carry passenger accident insurance, it does so on "governmental request"; for this information I am indebted to Dr. Schweickhardt, Legal Adviser of Swiss Air (letter of Dec. 13, 1961). Air France, which also offers passenger accident insurance, is a government corporation itself; *cf.* Gourrier, Le régime administratif de la compagnie nationale Air France, Thesis, Paris (1953).

[130] See Ehrenzweig, *op. cit. supra* note 89, at 22.

[131] The analogy to Workmen's Compensation has been pointed out by Sweeney, *supra* note 108, at 179 ff.

[132] See Ehrenzweig, Negligence Without Fault 12 ff. (1951); Rinck, Gefährdungshaftung (Göttingen 1960); *But cf.* Orr, *Fault as the Basis of Liability*, Paper delivered to the 4th Int'l Conference on Comparative Law in Paris 1954, see 21 J. Air L. & Com. 399 (1954). The philosophy underlying the concept of liability without fault has been discussed at great length by Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L.J. 499 (1961), who finds three—though sometimes inconsistent—justifications for absolute liability: (a) allocation of resources, (b) spreading of losses, (c) the "deep pocket" reasoning (shifting the burden of accident losses to the wealthiest class of litigants).

[133] *Supra* note 100. Art. 120: "The right to compensation has its objective basis in the accident or damage, and is actionable—up to the limits of liability established by this chapter—in any case including fortuitous event, and even when the carrier, operator, or their servants and agents, prove that they acted with due care." (Translation supplied.)

[134] *E.g.*, the Uniform Aviation Liability Act proposed by Wigmore, Goodrich, and Knauth, *supra* note 101. Wessels, *Das neue spanische Luftverkehrsgesetz*, 10 Z. Luftrecht 22 (1961), quotes the Spanish liability rule with full approval.

[135] Arndt, *supra* note 128; Kaftal, *supra* note 80; Ehrenzweig, *op. cit. supra* note 89, at 16 ("Tort law may well have reached the end of its usefulness in this field"); *id.*, *Towards an Automobile Compensation Plan*, 11 Fed. Ins. Counsel Quar. 5, 8 (1961) ("Tort liability, the villain of the play, must be removed together with liability insurance, its accomplice"). See also Strahl, *Tort Liability and Insurance*, in 3 Scandinavian Studies in Law 199 (1959). Art. 116 of the Brazilian Code of the Air, *supra* note 92, has been interpreted as substituting insurance for liability; François and Saporta, *supra* note 92, at 8 ("une disposition curieuse"). However, this does not seem to be borne out by the terms of the article: "The carrier may provide, for additional charges, insurance on persons or property being transported, provided he proves that he has obtained general insurance coverage with a company licensed by the state in an amount equal to twice the maximum limit of liability required by an aircraft of greater capacity in service" (translation Strauss, *supra* note 2, at 282). Also, Ehrenzweig, *Towards an Automobile Compensation Plan, supra*, at 9, interprets the German Air Law as "relieving the air carrier of his liability to those passengers for whom it has taken insurance." However, the German "obligatory passenger

liability entirely by an accident insurance system under which the passenger could recover regardless of the carrier's fault.[136]

c. A third group of compensation schemes grants the passenger a right of choice *a posteriori*: After the damage occurred, he is given an option either to accept payment of accident insurance, or to sue the carrier under ordinary liability rules.[137] By accepting the insurance compensation, the passenger or his legal representative exercises a release, and loses all further claims against the carrier.[138]

d. Finally, the carrier's liability may be preserved, even when the insurance payment has been accepted; but the amounts paid under the insurance will be deducted *pro tanto* from further claims against the carrier.[139] This type of insurance is neither based on,[140] nor a basis for,[141] nor a complete substitute for,[142] the carrier's liability. In other words, it is "haftungsneutral"; i.e., neutral with respect to liability.

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accident insurance" is rather deductible from, not a complete substitute for, liability claims against the carrier; see *infra*, text at notes 139 through 142.

[136] American Workmen's Compensation statutes contain provisions to the effect that the remedy under the act shall be exclusive of and a substitute for the employer's tort liability unless otherwise provided. See Riesenfeld and Maxwell, Modern Social Legislation 395 (1950); Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*, Paper delivered to the 4th Int'l Conference on Comparative Law in Paris 1954, see 42 Calif. L. Rev. 531, 559 (1954). *But cf.* Riesenfeld and Maxwell, *supra* at 148, n. 21; and see British Law Reform (Personal Injuries) Act (1948), 11 & 12 Geo. 6, c. 41; see also Lenhoff, *Social Insurance Replacing Workmen's Compensation in England*, 5 NACCA L.J. 49, 53 (1950).

[137] Air France passenger insurance policy, see *supra* notes 87, 91; pre-war Swiss Air policy, see Arndt, *supra* note 128, at 39, n. 138; Sweeney, *supra* note 108, at 325. The insurance required of British air carriers using U.S. airports in Britain (note 130) provided for a release by the passenger of his claims against the U.S. Government; see Ehrenzweig, *supra* note 130. In practice, many American carriers use a similar device: it is not unusual that claims by passengers, up to $500, are settled regardless of liability, provided the claimant signs a release of all further claims.

[138] Caisse Régionale de Sécurité Sociale du Sud-Est v. Air France, Court of Appeals of Aix-en-Provence (7th Civ. Chamber), March 13, 1959, 22 Rev. Gen. Air 194 (1959), with a note by Borricand at 197; 1959 U.S. & Can. Av. 427.

[139] "Pro tanto" extinction of liability: present Swiss Air passenger accident insurance policy, see Bodenschatz, *supra* note 86, at 237; German Aviation Act, *supra* note 98, § 50. *Cf.* U.S. Public Law 87-212 (1961) on Property Loss, Personal Injury or Death Incident to Aircraft or Missile Operations, H. R. 7934 (87th Cong.), 75 Stat. 488, § 2736(b): "Any amount paid under subsection (a) shall be deducted from any amount that may be allowed under any other provision of law to the person, or his legal representative, for injury, death, damage or loss attributable to the accident concerned." According to Paterson, in 38 Can. B. Rev. 635 ff. (1960), accident insurance payments reducing the pecuniary loss of the victim's family must be taken into account in calculating damages under the Warsaw Convention as enacted in the Canadian Carriage by Air Act, *supra* note 68, art. 17: "Unless there is to be found any statutory provisions which would require the court to exclude insurance monies from the calculation of . . . 'damage sustained' . . ., I believe that the court must take them into account." While this result seems objectionable as far as personal accident insurance taken and paid by the deceased himself is concerned, it would appear justified in the case of an automatic passenger accident insurance provided by the carrier.

[140] *Cf.* Bodenschatz, *supra* note 86, at 242; *contra* Weimar, *supra* note 91, at 221, and Abraham, Der Luftbeförderungsvertrag 77 (Stuttgart 1955).

[141] For the treatment of liability insurance as an independent basis of liability, see Ehrenzweig, *Assurance Oblige*, 15 Law Contemp. Prob. 445 (1950); Gregory and Kalven, Cases and Materials on Torts 620 (1959). In the field of accident insurance, this could be avoided by a stipulation along the lines of U.S. Public Law 87-212, *supra* note 139, subsection (d): "Payment of any amount under subsection (a) is not an admission by the United States of liability for the accident occurred."

[142] Thus preserving the "preventive effect" of liability on flight safety; see Monaco, *Les assurances en droit international*, 101 Recueil des Cours de L'Academie de Droit International de la Haye 381, 401 (1960). The carrier remains liable for damages in excess of the insurance coverage in the case of his or his agents' wilful misconduct (Art. 25). The action may be exercised by the passenger or by the underwriter, see art. 998 of the Italian Code; *cf.* also art. 1000: "The underwriter has action in recourse against the Carrier for the indemnity paid to the passenger when the damage is derived from fraud or grave fault of the Carrier or his servants

D. *Mandatory Passenger Accident Insurance And International Law*

There can be little doubt that any one of the compensation systems listed above can be imposed by legislation on domestic carriage as well as on the international operations of a state's own national carriers.[143] In fact, the statutory passenger accident insurance of Spain, West Germany, and Italy, applies to both domestic and international flights of all airlines carrying the flag of these countries.[144]

The problem of compliance with international law arises, where these insurance requirements are applied to foreign flag carriers. In practice, compulsory liability insurance,[145] but not passenger accident insurance,[146] has been imposed on foreign carriers so far.

Theoretically, a state may subject every foreign aircraft to its national laws, provided that this is done in a non-discriminatory manner.[147] Aviation insurance, having been left to national regulation,[148] is not an exception to this rule—unless the insurance requirement has the effect of changing the liability régime guaranteed by the Warsaw Convention. The relevant articles of the Convention are Articles 20, 23 and 32.

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and agents" (translation Manca, *supra* note 97, at 370). *But cf.* the 25th meeting of the Int'l Air Traffic Ass'n in Paris 1931, where the aviation insurers voluntarily agreed not to exercise their right of recourse against IATA airlines; see 15 Droit Aérien 282, 284 (1931). Significantly, those writers who proposed to substitute insurance for tort liability entirely, either preserved liability for wilful misconduct (Kaftal, *supra* note 80) or reintroduced a so-called "liability for criminal negligence" (Ehrenzweig, *op. cit. supra* note 89, at 33); in the air laws of Brazil and Argentina even the taking of insurance for the carrier's liability for intentional acts is prohibited (Brazilian Code, *supra* note 92, art. 109; Argentinian Code, *supra* note 94, art. 169). *Cf.* also the exceptional assertion of tort liability for intentional injury, in the Workmen's Compensation statutes of Arizona, Kentucky, Maryland, Oregon, Utah, West Virginia and Washington. Riesenfeld and Maxwell, *supra* note 136, at 395.

[143] Bodenschatz, *supra* note 86, at 246; Möller, Paper delivered to the 4th Int'l Conference on Comparative Law in Paris 1954, see 4 Z. Luftrecht 267 (1955); Meyer, Comment, 2 Z. Luftrecht 229 (1953); *contra* Weimar, *supra* note 91, at 221.

[144] See Bodenschatz, *supra* note 86, at 233, n. 1, 247; Marino, *supra* note 97, at 263. Since art. 996 of the Italian Code covers passengers in "every aircraft operated on the carrier's routes," even foreign charter aircraft would appear to be included; Bodenschatz, *supra* note 86, at 235.

[145] Brazilian Code, *supra* note 92, art 107: "There shall be required of aircraft registered in a foreign country, as indemnification for damages that they may cause to persons or property on Brazilian territory, the furnishing of security at least equal or considered equivalent to those of Brazilian aircraft." (Translation Strauss, *supra* note 2, at 281). However, according to ICAO Doc. LC-87/16-2-48, foreign operators only had to show insurance for damages caused to third parties on the ground, up to 1,000,000 Cruzeiros per accident; see François and Saporta, *supra* note 92, at 9. The 1952 CAB draft, *supra* note 111, § 271.14, also contemplated insurance requirements for foreign air carriers.

[146] Foreign airlines are not subject to the Spanish obligatory passenger insurance; see François and Saporta, *supra* note 100, at 892. According to Marino, *supra* note 97, at 263, the passenger accident insurance requirements of the Italian Code would also apply to foreign airlines engaged in international carriage to or from Italy; apparently, however, this is not done in practice. It has been suggested to extend the German passenger accident insurance requirements to foreign carriers serving the Federal Republic of Germany; see Möller, 10 Versicherungswirtschaft 124 (1955). In practice, this has not been done for policy reasons (fear of impairing the bargaining position of national carriers in commercial negotiations with the foreign countries concerned), see Bodenschatz, *supra* note 86, at 249.

[147] Chicago Convention (1944), ICAO Doc. 7300/2 (2d ed. 1959), 15 U.N.T.S. 295, art. 11: "Subject to the provisions of this Convention, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State." *Cf.* reference made to this article by Cooper, during the discussion of insurance requirements at the ICAO Legal Committee meeting in Rio de Janeiro 1953, *supra* note 66, at 164.

[148] *Supra* note 82.

1. Article 20 exonerates the carrier of his liability, if he proves that he acted with the necessary care.[149] Compulsory insurance coupled with "strict" liability (liability without fault) is therefore contrary to the Convention, even when it is only imposed as an enforcement sanction on carriers who fail to take insurance.[150]

2. Article 23 invalidates any provision tending to relieve the carrier of his liability.[151] An insurance system, which has the effect of replacing *a priori* the carrier's liability, is therefore contrary to the Convention, too.

3. There remain three compensation schemes that are not in violation of the Warsaw Convention:

a. Liability insurance, because it only purports to guarantee payment in the case of the carrier's liability;[152]

b. Accident insurance providing for a release of liability claims executed *after* the damage occurred, because such an *a posteriori* agreement is permissible under Article 32 of the Convention;[153]

c. Accident insurance providing for deduction of insurance payments from further claims, because this type of insurance is neutral with respect to liability.[154]

E. *Evaluation*

Having eliminated the compensation schemes not in accordance with the Convention, the remaining ones can now be evaluated on their practical merits. The aim is to find the compensation system best suited to implement the Convention, so as to grant recovery to air passengers, adequate to national economic standards.

1. Passenger liability insurance, besides relying on a questionable analogy,[155] is necessarily based on the carrier's liability for negligence (Articles 17 and 20), and thereby keyed to the limitation of liability (Article 22). The only additional advantage it would provide for passengers is guarantee of payment ("financial responsibility"); i.e., protection against an airline's insolvency. The improvement thus achieved would be negligible for

[149] "The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

[150] Art. 941, 2d sentence, of the Italian Code, *supra* note 97, has this effect, and consequently application of this provision to foreign air carriers would violate the Convention; *contra* Marino, *supra* note 146.

[151] "Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in the Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention."

[152] *E.g.*, see Resolution B of the Hague Conference, *supra* note 84: "a system of guarantees for the payment of compensation *in the case of liability* of the air carrier . . ." (Emphasis supplied.)

[153] Art. 32 invalidates clauses and special agreements infringing the rules of the Convention, if they were "entered into *before the damage occurred* . . . (Emphasis supplied.) *Cf.* Caisse Régionale de Sécurité Sociale du Sud-Est. v. Air France, *supra* note 138, upholding the release coupled with the Air France passenger insurance policy.

[154] See text *supra* at notes 139 through 142. Passenger accident insurance creates liabilities not for the carrier, but only for the underwriter. Meyer, 2 Z. Luftrecht 229 (1953); *accord*, Achtnich, 1 Z. Luftrecht 342 (1952); Möller, *supra* note 143, at 251, 267; Bodenschatz, *supra* note 86, at 246; *Contra:* Weimar, *supra* note 91, at 226; Abraham, *supra* note 140, at 77; Rinck, *Recent Developments in German Air Law*, 23 J. Air L. & Com. 479, 488 (1956), who all seem to associate accident insurance with carrier liability.

[155] See text *supra* at notes 122 and 123 (motor vehicle insurance, and aircraft insurance for surface damage). Unlike "third parties" on the road or on the surface, the air passenger directly contributes to the costs of the carrier's insurance, through his transportation fare: *Cf.* text *supra* at note 121.

American air passengers,[156] and would not seem to justify introduction of a system against which serious practical objections have been raised.[157]

What is needed is more than "financial responsibility." At a time when air travel has ceased to be the privilege of high-income groups, it is no longer sufficient to protect those passengers who are lucky or wealthy enough to win a law suit against an airline. What is more urgently needed is social responsibility for all the other accident victims of our air transport industry.

2. Passenger accident insurance coupled with a total *release* at the moment of payment, would give the accident victim an option of either accepting the insurance compensation (limited recovery regardless of liability), or rejecting it and suing under the Warsaw Convention (possibly unlimited recovery based on liability).

Whether this leaves the victim a fair choice is open to argument. A passenger—or his legal representative—who rejects the insurance payment, has three chances: (a) his suit against the carrier is successful, and he recovers damages in excess of the insurance amount (Article 3, paragraph 2; Article 25); (b) His suit is successful, but he recovers only within the limits of liability (Article 22); (c) His suit is unsuccessful, and he recovers nothing at all (Article 20). Only the first alternative; i.e., a successful suit for wilful misconduct, would make rejection of the insurance compensation advisible. Such a rejection will, in any event, deprive the victim of the "first aid" advantage of the insurance. However, for a passenger to decide at the moment of the insurance offer whether the carrier might be guilty of wilful misconduct is ordinarily impossible,[158] and to reject the insurance compensation on the ground of such a guess is bad gambling. Considering all these factors, the "accept-or-sue" option gives the accident victim what is commonly called "Hobson's choice,"[159] and in practice will have the effect of excluding liability claims against carriers *a priori.*

3. Passenger accident insurance, *pro tanto* deductible from further claims, would appear as the most advantageous compensation scheme for air passengers. It grants quick relief in all cases, regardless of the carrier's liability, without litigation, and without attorney's fees. It does not, however, deprive the accident victim of the possibility of suing the carrier under Article 25 of the Convention within two years (Article 29).

Although in practice the coverage amounts of passenger accident insurance are usually set at the same level as the Warsaw or Hague limits,[160] they are theoretically independent of liability limitations. At the ICAO Legal Committee meeting of 1953, most delegates expressed opposition

[156] "In the entire history of civil aviation in the United States, no certificated air carrier has ever been known to default in payment of a personal injury or property damage judgment against it arising out of an accident." Tipton and Bernhard, *supra* note 112, at 75.

[157] Tipton and Bernhard, *supra* note 112.

[158] Public investigations into the causes of air accidents last months and often wind up without a result. See Orr, *Accident Investigations of the U.S. Civil Aeronautics Authority,* 1954 Ins. Counsel J. 123; Whitehead, *Civil Aeronautics Board Accident Investigation Hearings—Boon or Bane,* 1961 Ins. Counsel J. 258. Incidentally, the airlines take "a most active role in the CAB investigation, the defense of charges of alleged negligence," etc.; see Lucas, *Who May Be at Fault for an Airline Crash,* 1961 Ins. L.J. 621, 624.

[159] Following the expression used in National Foam System Inc. v. Urquhart, 202 F.2d 659, 664 (3rd Cir. 1953).

[160] *Cf.* coverage amounts in Switzerland, France, Italy, West-Germany, Austria, *supra* notes 86, 87, 97, 98, 99.

to possible national insurance requirements, as well as liability requirements, in excess of the Warsaw limits.[161] However, a Spanish proposal to enjoin member states from imposing either higher limits of liability, or higher insurance coverage, was not adopted.[162]

It is submitted that mandatory accident insurance of a "neutral" type, which would not prejudice the carrier's liability position, is permissible even if the coverage required exceeds the limits of liability set at Warsaw and at The Hague. If applied to all carriers on a non-discriminatory basis, it is within the national jurisdiction recognized by Article 11 of the Chicago Convention,[163] no less than air safety requirements, airport taxes, or the mandatory approval of passenger tariffs.

III. Blueprint for an Air Passenger Compensation Plan

For an outline of a passenger accident compensation system, valuable experience may be drawn from similar schemes set up abroad, and from the well-established system of Workmen's Compensation in this country.

A. *Organization*

There are essentially three ways of setting up an accident compensation scheme (although, certainly, many combinations are conceivable).

1. Carriers may be required by statute to take group accident insurance with an insurance company. This is the method employed by those European countries where mandatory passenger accident insurance is in existence.[164] It should be noted, however, that these countries have either nationalized insurance corporations,[165] or have a more or less cartelized aviation insurance industry[166] subject to nation-wide public control of policy terms and premium rates.[167] Adopting a similar system in the United States would create problems for several reasons.

a. Although insurance is within the realm of federal jurisdiction,[168] the Civil Aeronautics Board is not equipped to assume the functions of a "super insurance commission" controlling aviation insurance policies and rates;[169]

b. Bureaucratic intervention in private insurance operations, such as standardization of rates and policies, would presumably result in a financial

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[161] 9th Session, Rio de Janeiro (1953), ICAO Doc. 7450-LC/136, vol. I, at 163-165.

[162] *Ibid.*

[163] *Supra* note 147.

[164] Italy, West-Germany, Austria, Spain, see *supra* notes 97 through 100. In the field of Workmen's Compensation, Texas has a statute imposing insurance with private underwriters on employers. See Riesenfeld, *Efficacy and Costs of Workmen's Compensation*, 49 Calif. L. Rev. 631, 655 (1961).

[165] In Spain, the "Comisaria" for Obligatory Passenger Insurance, supervised by the "Direccion General" of Banking, Stock Exchange and Investments, as well as by the Ministry of Public Works (1942 Regulation, art. 13). See François and Saporta, *supra* note 100, at 888 ff.; Bodenschatz, *supra* note 86, at 233.

[166] In Switzerland, the Swiss Pool for Aviation Insurance (1947), see Kubli, *supra* note 86; Guldimann and Vogel, *supra* note 86, at 244. In Germany, the "Deutscher Luftpool" (1924), see Wimmer, 2 Z. Luftrecht 213 (1953).

[167] *E.g.*, the German Federal Insurance Agency ("Bundesaufsichtsamt für das Versicherungs— und Bausparwesen"); the Federal Ministry of Transport can influence aviation insurance coverage through this agency, see Bodenschatz, *supra* note 86, at 243.

[168] See U.S. v. South-Eastern Underwriters Association, 322 U.S. 533 (1944); *cf.* Sawyer, Insurance as Interstate Commerce 40 (1945).

[169] Tipton and Bernhard, *supra* note 112, at 78.

overhead that might well become a needless and socially wasteful burden on the industry;[170]

c. A substantial part of the new business generated would probably go to foreign insurance companies, who already underwrite part of the present liability insurance of American air carriers,[171] and whose operations are beyond U.S. control.

2. Carriers may be required to contribute to a public compensation fund, from which all accident claims are then to be satisfied. This is the solution adopted for Workmen's Compensation by 19 states in this country.[172] In six of them, participation in the state fund is mandatory,[173] and contributions to the fund have the nature of an excise tax.[174] Two states accept self-insurance alternatively,[175] and in the other eleven jurisdictions the state fund competes with both private insurance companies and self-insurance.[176]

Considering the fundamental reforms through public intervention which a similar system for aviation accident compensation would require,[177] it would not easily be adopted in the United States.

3. The third method can be described as "collective self-insurance" by the air transport industry. There could be a special mutual liability association of air carriers, similar to the employers' insurance association for writing compensation insurance, which existed in Massachusetts[178] and in Texas,[179] and which were encouraged by other jurisdictions[180] in the field of Workmen's Compensation.[181] American international air carriers could set up a joint compensation fund financed by contributions from member airlines. The fund would handle all claims from air passengers arising out of accidents which occurred on international carriage to and from the United States. Whether participation in the fund were to be mandatory for both American and foreign flag carriers serving this country is a question of policy.

It is interesting to note that similar plans have been put forward on an international scale. In 1928 the International Air Traffic Association discussed proposals for a "coopérative d'assurances" among member air-

[170] *Cf.* the situation in American Workmen's Compensation, where the National Council on Compensation Insurance in its Annual Report for 1960, at 5, suggests an expense loading factor of 37.7% of the net premium dollar. See Riesenfeld, *Basic Problems in the Administration of Workmen's Compensation*, 36 Minn. L. Rev. 119, 138 (1952); Riesenfeld, *supra* note 164, at 656.

[171] See Tipton and Bernhard, *supra* note 112, at 78.

[172] Riesenfeld and Maxwell, *supra* note 136, at 147. This type of fund is comparable to the "Caisses régionales de sécurité sociale" in France; *cf.* Riesenfeld, *supra* note 136, at 557, n. 167.

[173] "Monopolistic" or "exclusive" state funds: Nevada, North Dakota, Oregon, Puerto Rico, Washington, and Wyoming.

[174] See State Industrial Accident Commission v. Aebi, 117 Ore. 361, 162 P.2d 513, 161 A.L.R. 211 (1945).

[175] Ohio and West Virginia.

[176] "Competitive" state funds: Arizona, California, Colorado, Idaho, Maryland, Michigan, Montana, New York, Oklahoma, Pennsylvania and Utah.

[177] There is also the argument that such a reform should not discriminate against, or "penalize," the air transport industry as compared with other industries.

[178] Mass. Acts and Res., c. 751 (1911). The Ass'n was placed *pari passu* with other mutual companies by an act of 1916, now Mass. Ann. Laws, c. 152, § 53 (1942).

[179] Texas Gen. Laws, c. 179 (1913).

[180] Indiana, Iowa, Minnesota, Nebraska. See Riesenfeld and Maxwell, *supra* note 136, at 148, n. 23.

[181] These associations are comparable to, and were partly inspired by, the German "Berufsgenossenschaften." See Riesenfeld, *supra* note 136, at 557, n. 167.

lines.[182] Establishment of a national compensation scheme in this form might well become a nucleus for a wider fund including all air carriers engaged in international carriage.[183]

B. *Enforcement*

Either of two methods may be used to require air carriers to obtain accident insurance—increased liability as a penalty in case of non-compliance, or administrative sanctions.

The imposition of strict liability on carriers who fail to take insurance[184] may be the most effective way of enforcement with domestic air carriers;[185] but it would appear to be contrary to the liability régime of the Warsaw Convention.[186] In administrative enforcement civil aviation authorities usually require proof of insurance as a condition for granting airworthiness certificates[187] or operating licenses.[188]

C. *Costs*

Passenger accident insurance would partly replace the airlines' liability insurance or self-insurance,[189] for insofar as the carriage is covered by accident insurance, no liability claims against the carrier will arise.[190] The need for liability insurance or funding would remain only for claims exceeding the accident insurance coverage.[191]

A cost calculation for the passenger accident insurance scheme will therefore have to take into account a sizeable reduction of business costs incurred through purchasing liability insurance and funding self-insurance plans.

Group insurance by the airline[192] would also put to an end most of the

[182] 19th Session of IATA, Warsaw 1928; see 12 Revue Juridique Internationale de la Locomotion Aerienne 367 (1928).

[183] A proper forum for such an international plan would be the Int'l Air Transport Ass'n which has as its active members the majority of the world's airlines, and which already operates a highly successful international financial institution, the IATA Clearing House in London, (annual turn-over $2 billion). See Capdeville, *La Chambre de Compensation de l'I.A.T.A.*, 10 Rev. Franc. Droit Aérien 349 (1956).

[184] Italian Code of Navigation, art. 941, 2d sentence, *supra* note 97. In most American Workmen's Compensation statutes the non-insurer is deprived of the so-called common-law defenses (*i.e.*, contributory negligence, assumption of risk, negligence of fellow-servant). In California the non-insurer is subject to a statutory presumption of negligence; see Calif. Labor Code, § 3708; *cf.* Chakmakjian v. Lowe, 33 Cal.2d 308, 201 P.2d 801 (1949). In Massachusetts, he is subject to strict liability; see Mass. Ann. Laws (1950 and 1953 Supp.), c. 152, §§ 66, 67; *cf.* Zarba v. Lane, 322 Mass. 132, 76 N.E.2d 318 (1947). Failure to take insurance has also been construed as a basis for strict liability in other countries, *e.g.*, see a Norwegian case, 1940 Norsk Rettstidende 16, quoted by Strahl, Förberedande Utredning Angaende Lagstiftning pa Skadestandsrättens Omrade 138 n. 80 (1951).

[185] Another method, proposed by the "Uniform Aircraft Financial Responsibility Act" of 1953, *supra* note 104, is to impose an obligation to deposit security on un-insured carriers who encounter an accident. *But cf.* the critique by Grad, *supra* note 122, at 305, and by Ehrenzweig, *supra* note 135, at 7, of similar devices in automobile accident law.

[186] See text *supra* at note 150.

[187] Brazilian Code of the Air, *supra* note 92, art. 105, 106.

[188] The German Federal Ministry of Transport, pursuant to § 32, para. 12 of the Aviation Act, decreed that no approval of operating certificates will be granted unless the carrier shows insurance taken with a nationally licensed underwriter. Letter from Fed. Minister of Transport to Land Ministers of Transport (Dec. 29, 1955), see 1956 Verkehrsblatt (No. 1) 7; 1956 Nachrichten für Luftfahrer (No. 1) B.

[189] See text *supra* at notes 120, 121.

[190] "Pro tanto" extinction, see note 139.

[191] As a result, airlines will carry a combined accident/liability insurance. For Germany, see Achtnich, 1 Z. Luftrecht 342 (1952); for Italy, Bodenschatz, *supra* note 86, at 235.

[192] Insurance costs could be reduced, or even "minimized, if its burden were shifted to the

"multiple-insurance" loss which the traditional system generated. No longer would the passenger insure, by his (optional) personal accident insurance, the same risk which is already partly covered by the carrier's liability insurance.[193]

A rough comparison of the price of personal accident insurance presently available at United States airports,[194] and of the costs of airline group accident insurance in Switzerland,[195] France[196] and Germany,[197] shows that introduction of a passenger accident insurance would not have to be followed by a fare increase.[198]

The relatively low additional costs of group accident insurance would also appear to make unnecessary the "double-fare" solution which was suggested in 1956,[199] not to mention the complications in fare-structures which are likely to ensue from such a system.[200]

D. *Coverage*

Calculation of the necessary minimum insurance coverage is based upon the expected measure of risk, and in this respect is similar to the calculation of limitations of liability such as the Warsaw and Hague limits. There are three methods of translating this "generalized measure of risk" into monetary amounts of insurance coverage:

1. The amount can be fixed by the statute, either as a flat sum,[201] or as

carrier, since all passenger liability would then be insured in one transaction." New York City Bar Ass'n Rep. *supra* note 6, at 258.

[193] This reduction of social costs by group accident insurance was pointed out by Loniewski, Assurance et Responsabilite en Matiere de Transport (Paris 1926); see Weimar, *supra* note 91, at 222.

[194] According to Tipton, *Current Trends in Aviation Insurance*, 1946-47 Proceedings of ABA Section of Ins. L. 214, 217, insurance was then available at a rate of 20 cents per $5,000 coverage. Reiber, *supra* note 6, at 286, indicates the same rate for 1956, for domestic carriage and for certain international flights. Whitehead, *supra* note 6, at 36, indicates that personal accident insurance for international carriage is available at air terminals at a rate of $10 per $125,000 coverage.

[195] The premium for Swiss Air's passenger accident insurance is approximately 1 Swiss Franc (25 cents) for 1000 passenger/kilometers, at a coverage up to 36,000 Francs (approx. $9,000, *supra* note 86). Information by courtesy of Dr. Schweickhardt, Legal Adviser Swiss Air (letter of Dec. 13, 1961).

[196] The premium for the Air France passenger accident insurance is approximately 0.85 New French Francs (17 cents) for 1000 passenger/kilometers, at a coverage up to 34,800 Francs (approx. $7,000, *supra* note 87). Information courtesy of M. Lemoine, Associate Director General Air France (letter of Dec. 15, 1961).

[197] The premium for the West-German statutory passenger accident insurance is calculated on an annual basis per available passenger-seat. It is presently 273 Deutsche Mark ($68) plus 5% Federal Tax, for death and disability at a coverage up to 35,000 Marks (approx. $8,700, *supra* note 98). Information courtesy of Dr. Wimmer, Deutscher Luftpool and Vice-President, Int'l Union of Aviation Insurers (letter of Oct. 31, 1961).

[198] When German and French carriers first introduced their insurance plans—more than 30 years ago—they did not raise fares. Swiss Air, in reply to a survey concluded in 1952 by the Air Law Research Institute of Cologne University, indicated that the introduction of its passenger accident insurance had a negligible effect on insurance costs, which neither resulted in increased fares nor interfered with the airline's competitive position. See Achtnich, *supra* note 91.

[199] New Jersey State Bar Ass'n, *supra* note 118. This proposal would necessarily result in two parallel air transport fares, one including insurance, the other excluding it. In practice, the air carrier would become a sales agent of the underwriter.

[200] A similar system was considered when Lufthansa introduced its insurance plan in 1926, but it was rejected for practical reasons ("two-fare" complications). See Döring, *supra* note 98, at 121. Although the Spanish Regulation of 1942, in art. 19 (mentioned in note 100), imposed the price of group accident insurance as a separate and additional charge on the passenger, information from Iberia Spanish Airlines indicates that in practice it was included in the price of the ticket. See Bodenschatz, *supra* note 86, at 233, n. 1.

[201] As in the Italian and Spanish Aviation Acts, *supra* notes 97, 100. See also Workmen's Compensation statutes, in U.S. Bureau of Labor Standards, Dep't of Labor Bull. No. 161;

a minimum.[202] However, this will require frequent legislative amendments in the future,[203] as costs of living and monetary values change.[204]

2. The authority to set insurance requirements can be delegated to an administrative body, which could fix insurance coverage amounts on an annual basis, thus allowing for more flexibility. However, such discretionary powers would involve the risk of arbitrary decisions, based upon extra-economic factors.

3. Finally, there is the intermediate choice of a "sliding scale," whereby the statutory coverage amounts are geared to the most relevant economic index.[205] To determine this index is an actuarial task,[206] and well beyond the scope and capacity of this writer. Data from a number of past events, such as national income per capita,[207] national average life expectancy,[208] average compensation settlements,[209] accident statistics, etc., will have to be projected into the future[210] in order to establish the measure of risk from which concrete monetary amounts may be deduced. Any such analysis is based on assumptions, "but perhaps progress toward a more sensible allocation of accident losses cannot wait for better knowledge on which to build an ideal system."[211]

E. *Right Of Action*

Since passenger accident insurance is taken for the benefit of the passenger or his legal representative, it would seem logical to grant the beneficiary a direct right of action against the underwriter,[212] and to determine

State Workmen's Compensation Laws, table 7 at 20, (rev. May 1960); *cf.* Riesenfeld, 49 Calif. L. Rev. 631, 634.

[202] As in the German and Austrian Acts, *supra* notes 98, 99.

[203] In West Germany, the coverage amounts had to be raised from 20,000 to 35,000 Marks in 1957. Italy: (1942) 160,000 Lire, (1959) 5,200,000 Lire. Spain: (1941) 30,000 Pesetas, (1950) 40,000 Pesetas, (1959) 80,000 Pesetas, (1960) 200,000 Pesetas.

[204] The equivalency of the Warsaw limits (125,000 gold francs) in terms of U.S. Dollars increased from $4,898 in 1929, to $8,292 in January 1953. Thus, the gold value in currency was increased 169% of the 1929 level, while the cost of living index in the same period went up to 156% of its earlier level, resulting in an 8% increase in the buying power of the gold franc within the United States. See ACC Economic Division Report, ACC Doc. 51/22, 14(A), as quoted by Orr, *The Rio Revision of the Warsaw Convention*, 21 J. Air L. & Com. 39, 48 (1954). *But cf.* Tuller v. KLM, *supra* note 21, at 778, evaluating 125,000 gold francs at $12,500 in 1929, and at $8,300 in 1961.

[205] *E.g.*, in most Workmen's Compensation statutes, payments are geared to the previous earning scale of the accident victim. See U.S. Bureau of Labor Standards, *supra* note 201, tables 7-11.

[206] Morris, C. Robert, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight*, 70 Yale L.J. 554, 600 (1961), points out that many tests which appear to rest upon economic considerations prove faulty, and prefers a test of fairness to the entrepreneur "not to treat him contrary to his reasonable [actuary] expectations."

[207] *Cf.* text *supra* at notes 60, 61.

[208] Put in an over-simplified mathematic formula, following the "rule of thumb" quoted in note 60 *supra*, the proposed insurance coverage would have to be a.(b-c); "a" being the national annual per capita income, "b" the national average life expectancy, and "c" the average age of air passengers.

[209] According to information obtained from counsel for a large North-American air carrier, who prefers not to be quoted, the average settlement for passenger death claims in North America was $8,000 in 1941; $14,000 in 1946; $22,000 in 1953; and $26,000 in 1958.

[210] The first assumption of the "actuarial process," as formulated by Morris *supra* note 206, at 560 ff., is "that the immediate future will be much like the recent past."

[211] Morris, Clarence, *Hazardous Enterprise and Risk Bearing Capacity*, 61 Yale L.J. 1172, 1179 (1952).

[212] Under both the Italian and the German Aviation Acts, the passenger himself may exercise the claim against the underwriter. See Revised Insurance Conditions, as approved by the German Federal Insurance Agency in 1957, "Special conditions for the obligatory air passenger accident insurance (OPUV)," LuU6; *cf.* Handbuch für die Luftfahrtversicherung (interne manual,

the persons who have a right to sue, either by specific enumeration[213] or by reference to the general law of maintenance.[214]

Alternatively, if this is not acceptable for any reason,[215] the victim should at least be granted a statutory right of action against the carrier himself. This would eliminate from the pleading of the Warsaw Convention before American courts a conflict-of-laws dogma which is wholly inappropriate to international air transport in the jet age—namely the *"lex loci delicti"* doctrine, as applied to passenger damages.

In order to give the victim a cause of action, courts used to characterize the aircraft accident either as a tort[216] or as a breach of contract.[217] In either case, a specific local law "governing" the delict or the contract had to be pleaded—the law of the place where the wrong occurred, where the force was "impinged," where the death occurred, or where the contract was concluded, performed, broken, etc. In most cases, that specific local law, e.g., of Portugal,[218] had neither a reason for nor any interest in governing the legal relations between an American air carrier and his American passenger, who happened to overfly a piece of Portuguese territory when the accident occurred.[219] The dogma that the "provisions of the Warsaw Convention attach to the right of action created by the lex

Deutscher Luftpool) 87. In Italy, the carrier may exercise the right of action on behalf of the passenger (art. 998, *cf.* note 97).

[213] The British Carriage by Air Act implementing the Warsaw Convention names the members of the passenger's family for the benefit of whom the liability provisions are enforceable, granting them one action for the benefit of all. The amount of damages is to be divided between them by the Court. *Cf.* also the Irish, Canadian and Australian Acts, *supra* note 68.

[214] *E.g.*, the German statute implementing the Warsaw Convention, *supra* note 68, § 1, refers to § 21 of the Aviation Act (now § 35 ff. of the 1959 Act, *supra* note 98), which speaks generally of "persons to whom the deceased owed a duty of maintenance." The Swiss statute makes a similar reference to the general law of obligations. *Cf.* Riese, Luftrecht 398, 469, 487 (Stuttgart 1949).

[215] Although "direct action" statutes are now spreading in the United States—see Ehrenzweig, Conflict of Laws 32, 116, 132, 140 (1959)—there still seem to be many who consider the direct action by the victim against the underwriter as "conceptually impossible"; *cf.* Ehrenzweig, *Towards an Automobile Compensation Plan*, 11 Fed. Ins. Counsel Quar. 5, 8 (1961).

[216] Characterization generally applied by courts of common law countries, *cf.* cases cited *supra* notes 27 through 38. At the 11th Session of the ICAO Legal Committee in Tokyo (1957) the British delegate said that "he had been brought up in English law and had thought of the Warsaw Convention primarily as regulating liability in tort or delict of the carrier"; see Kean, Tokyo Minutes ICAO LC I, 14. *But cf.* Prosser, *The Borderland of Tort and Contract*, Selected Topics on the Law of Torts 380 ff. (1953).

[217] Characterization generally applied by courts of civil law countries, see, *e.g.*, G. & L. Berufsgenossenschaft v. Deruluft German-Russian Airlines, (German Reichsgericht 1939), 161 R.G.Z. 76 (1939); Calcio Torino v. Aviolinee Italiane, (Italian Corte di Cassazione 1953), 20 Rivista del Diritto della Navigazione II. 201 (1954); see 22 J. Air L. & Com. 99 (1955); Hennessy v. Air France, (Paris Cour d'appel 1954), 8 Rev. Franc. Droit Aérien 45 (1954), see 21 J. Air L. & Com. 367 (1954); Jacquet v. Club Neuchâtelois d'Aviation, (Swiss Bundesgericht 1957), 83 B.G.E. II. 231 (1957), see 25 J. Air L. & Com. 344 (1958). "We do not see how one could pretend that a text so clear and precise as is art. 1 of the Warsaw Convention could allow a characterization, and justify a liability of the carrier, other than contractual." Georgiades, *Quelques réflexions sur l'affrètement des aéronefs et le project de convention de Tokyo*, 13 Rev. Franc. Droit Aérien 120 (1959). *But cf.* Litvine, Precis Elementaire de Droit Aérien 131 (Brussels 1953), who maintains that the carrier's liability is neither contractual nor quasi-delictual, but "legal."

[218] See cases cited in note 28 *supra*.

[219] This conceptualism has gone so far that in Pignataro v. United States, (E.D.N.Y. 1961), 1961 U.S. & Can. Av. 121, 123, the complaint for bodily injury of an infant during a flight from Dhahran (Saudi-Arabia) to Asmera (Eritrea) was dismissed "on the ground that it fails to set forth the local law upon which the claim is grounded." The case did not come under the Warsaw Convention, since it involved government aircraft (see reservation in the additional protocol to the Warsaw Convention; also Art. XXVI of the Hague Protocol), and because Saudi-Arabia has not adhered to the Convention.

loci delicti"[220] becomes still more absurd when an aircraft on a "Warsaw" flight happens to crash in a state which is not a member of the Convention.[221] The court will have to proceed to a "fictitious ratification" and decide the case on the ground of what would be the law of that country if it had ratified the Convention!

A statutory right of action would do away with the conflicts problem and with the conceptualist quarrel about contractual or delictual cause of action;[222] this has long been accomplished by the British, Irish, Canadian and Australian statutes implementing the Warsaw Convention.[223]

IV. Conclusion

As one distinguished European scholar and judge stated in 1949, "the United States have taken the leadership in the field of international air law, which formerly had been the prerogative of the European states with France predominant."[224] This leadership is not only a privilege, but also a responsibility.

It is superfluous to emphasize here the effect on world public opinion which a withdrawal of the United States from the most widely accepted international treaty on commercial law would have. The Warsaw Convention has protected the interests of both American air carriers and American air passengers, and so will the Hague Protocol. The United States could maximize the benefits of these treaties for her citizens, by enacting appropriate implementing legislation.[225]

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[220] Komlos v. Air France, *supra* note 28, 1952 U.S. & Can. Av. 310, at 317.

[221] At the time of the Lisbon air crash (1943), out of which the Garcia, Indemnity, and Ross/Froman cases arose (*supra* note 28), Portugal was not a member of the Warsaw Convention. Portuguese adherence came in 1947, so that the legal situation was different in the air crash at the Portuguese Azores (1949), which gave rise to the Komlos, Royal Indemnity, Supine and Hennessy cases (*supra* notes 28, 217).

[222] *Cf.* Calkins, *The Cause of Action under the Warsaw Convention*, 26 J. Air L. & Com. 217, 323 (1959); Clancy, *Fatalities in Aircraft Crashes—A Contractual Basis of Recovery?*, 27 J. Air L. & Com. 262 (1960).

[223] *Supra* note 68.

[224] Riese (now Justice, Supreme Court of the European Common Market Communities, in Luxembourg), *supra* note 214, at 109.

[225] Hardman, *supra* note 16, at 700, concludes: "The inadequacy of the common law rules of liability to cope with perplexing problems presented by aviation must be brought to the attention of our federal legislators. Subsequent legislative studies, stemming from this awareness and the encouragement of the legal profession, should conclude with the realization that the industry has reached a stage of development at which it is regarded as feasible to afford a system of social insurance and result in the enactment of a federal statute embodying such principles."

INTERNATIONAL REVIEW†

INTERNATIONAL CIVIL AVIATION ORGANIZATION

REPORT OF THE LEGAL SUBCOMMITTEE ON "THE LEGAL STATUS OF AIRCRAFT" DRAFT CONVENTION, MEETING IN MONTREAL MARCH-APRIL, 1962

Introduction

1. On 27 November 1961 the Council decided that the Chairman of the Legal Committee should be requested to appoint a subcommittee of the Legal Committee to consider the comments received from States and international organizations on the draft convention of offences and certain other acts occurring on board aircraft prepared by the Legal Committee, at its Twelfth Session, held in Munich in 1959.

1.1 Accordingly, the Chairman of the Legal Committee appointed this Subcommittee.

Meetings and Membership

2. The Subcommittee met at the Headquarters of ICAO in Montreal, from 26 March to 5 April 1962. It held eighteen meetings under the chairmanship of Mr. R. P. Boyle (United States of America). The following attended:

Mr. J. P. Houle (Canada)
Mr. A. Garnault and Mr. P. Lescure (France)
Mr. G. Schmidt-Räntsch (Federal Republic of Germany)
Mr. I. Narahashi and Mr. R. Hirano (Japan)
Mr. J. P. Honig and Mr. C. E. Cathalina (Netherlands)
Mr. C. Gómez Jara (Spain)
Mr. A. W. G. Kean (United Kingdom of Great Britain and Northern Ireland) and
Mr. R. P. Boyle and Mr. J. H. Wanner (United States of America).

2.1 Mr. K. Sidenbladh (Sweden) and Mr. J. B. Diaz (Philippines), Chairman and Vice-Chairman, respectively, of the Legal Committee, were present as *ex-officio* members of the Subcommittee.

2.2 Observers in attendance were:
Mr. N. H. Errecart (Argentina)
Messrs. J. C. Cooper and J. G. Gazdik (IATA)
Messrs. R. J. Belec and G. W. Reed (ICPO) and
Mr. N. J. Logan (IFALPA).

2.3 Members of the Subcommittee who could not attend were:
Mr. R. Monaco (Italy)
Mr. E. M. Loaeza (Mexico)
Mr. C. Berezowski (Polish People's Republic), Vice-Chairman of the Legal Committee and *ex-officio* member, and
Mr. F. K. Moursi (United Arab Republic).

Preparation of this Report

2.4 The Subcommittee approved the draft of the present report at its final meeting on 5 April and authorized a Group, composed as follows, to establish the

† Compiled by Julian Gazdik in co-operation with ICAO Officials, E. R. Marlin, Director of Technical Assistance Bureau, G. F. Fitzgerald (on legal matters), A. M. Lester (on economic/statistical matters) and Mrs. M. A. Dowling.

final text: Mr. R. P. Boyle, Mr. J. P. Houle, Mr. P. Lescure and Mr. N. H. Errecart. The Group met on 16 and 17 April and approved the present text.

Method of Work

3. The Subcommittee agreed that the Munich draft convention should be considered article by article in the light of the comments which had been filed with the Organization by the States and international organizations.

3.1 It was further agreed that the purpose of the Subcommittee was not to prepare a revised draft convention, but rather, in the light of the comments of States and international organizations and its discussions thereon, to present its own comments and recommendations to the Legal Committee concerning the various articles of the draft convention. This procedure would not, however, preclude the Subcommittee from recommending to the Legal Committee redrafts of certain articles of the Munich draft where it was felt that such redrafts were desirable.

3.2 The Subcommittee considered:

(a) the comments made by States and international organizations on the Munich draft convention: these are comprised in Working Drafts Nos. 3, 4, 5 and 6 which accompany this report (Working Drafts Nos. 1 and 2 being respectively the draft convention and the report thereon prepared by the Legal Committee at Munich); and

(b) certain new proposals which were presented to the Subcommittee during its session, namely, those relating to Extradition, "Hijacking" (Unlawful Seizure of Aircraft) and Chartered Aircraft: these are dealt with in paragraphs 34 and 36.3 below.

3.3 With respect to the comments mentioned at (a) in the foregoing subparagraph, it should be mentioned that the Subcommittee gave careful consideration to all of them; those comments in respect of which the Subcommittee recommends specific action are particularly mentioned in this report; the other comments are not so mentioned, except in a few cases where opinion within the Subcommittee was equally, or almost equally, divided.

3.4 Attention is called to the fact that while the Subcommittee has in this report expressed its opinions or recommendations on most of the questions examined by it, it has not done so in some instances. Instead it has referred some questions to the Legal Committee, calling its attention to the necessity of finding solutions. The reason for this is that the questions concerned relate to basic issues which the Subcommittee believes require solution by the Legal Committee itself. Some examples of this are: the problems concerning State aircraft (see paragraph 9.1 below); whether it is obligatory or optional for a State party to the proposed convention to enact laws giving it jurisdiction over offences committed on its aircraft outside its territory (paragraph 15 below); extradition (paragraph 34.2); "hijacking" (paragraph 35.2 below); chartered aircraft (paragraph 36.3 below).

Commentary on the Munich Draft Article by Article

Article 1, paragraph 1, introductory part

4. The Subcommittee noted that the words "other acts" found in the introductory part of Article 1(1) were intended to mean "acts" jeopardizing the safety of the aircraft, or persons or property therein, or jeopardizing good order and discipline on board, as specified in Article 5(1). However, the Subcommittee considered that this was not entirely clear under the present text of Article 1(1) and decided to recommend that the words "other acts" be replaced by the formula used in Article 5(1), so that the text of the introductory portion of Article 1(1) would read as follows:

> "1. This Convention shall apply in respect of offences and of acts which, whether or not they are an offence, may or do jeopardize

> the safety of the aircraft or persons or property therein or which jeopardize good order and discipline on board, when committed or done by a person on board any aircraft registered in a Contracting State, while that aircraft is: . . .".

As a result, consequential drafting changes have been *recommended* in respect of Articles 5(1) and 6(1) (see paragraphs 23.4 and 26.3 respectively).

4.1 The Subcommittee recognized that, while Article 1(1) spoke of offences and acts "committed or done", Article 5(1) referred, in addition, to anticipated acts, thus: "when the aircraft commander has reasonable grounds to believe that a person has committed, *or is about to commit* . . . an act. . . ." (italics supplied). However, the Subcommittee considered that the lack of reference to anticipated acts in Article 1(1) would cause no difficulty in the application of Article 5(1).

4.2 In relation to the words "by a person on board" found in the introductory part of Article 1(1), the question was raised whether or not an offence or an act contemplated in Article 1(1) would fall under the convention if the person who had instigated the offence or act was not on board the aircraft at the time of occurrence. The view of the Subcommittee was that according to the present draft of the convention such person must be on board and that it was *for the Legal Committee to decide* whether or not the scope of the convention should be extended to include offences or acts occurring on board the aircraft while their author was not on board, e.g., a person who sent a package containing a time bomb.

5. The Subcommittee decided to *recommend* to the Legal Committee that the word "civil" be deleted from the introductory provision of Article 1(1) in view of the existence of the definition of "State aircraft" found in Article 1(3). If the word "civil" was kept in Article 1(1), there might be a conflict between Article 1(1) and Article 1(3). If the Legal Committee decided to delete the word "civil" from Article 1(1), consideration should be given to including a reference to civil aircraft in Article 1(3) along the lines of the statement included in the first sentence of Article 3(a) of the Chicago Convention, which sentence reads as follows:

> "This Convention shall be applicable only to civil aircraft, and shall not be applicable to State aircraft."

Article 1, paragraph 1, subparagraphs (a) to (d)

6. The Subcommittee considered that subparagraph (c) should be revised to make it clear that the subparagraph applied not only to an offence committed while the aircraft in question was in flight "in the airspace of the State of registration," but also while it was in flight between two points in the territory of the State of registration even though over the high seas or areas of undetermined sovereignty. Accordingly, the Subcommittee *recommends* that subparagraph (c) be redrafted as follows:

> "(c) In flight between two points in the territory of the State of registration if a subsequent landing is made in another Contracting State with the said person still on board;"

6.1 The Subcommittee considered that subparagraph (c) as thus redrafted placed no limitation on the right of the State of subsequent landing to exercise jurisdiction. Thus, the convention would apply even where the offence concerned had already come to the knowledge of, and been investigated by, the authorities of the State of registration during an intermediate stop of the aircraft in the State of registration.

6.2 The Subcommittee *considered* that the words "if a subsequent landing is made in another Contracting State with the said person still on board" require

clarification in future drafting. In particular, the question was raised whether the person concerned must have been continuously on board.

6.3 The Subcommittee noted that, while the English text of subparagraph (c) contained the word "still," no equivalent word was found in the French and Spanish texts. Therefore, it decided to *recommend* that this discrepancy be corrected by the insertion of the words "encore" and "todavía" in the French and Spanish texts respectively.

Article 1, paragraph 2

7. The Subcommittee *noted the necessity* of so drafting Articles 1(2) and 5(3) as to avoid a conflict between them and to make it clear that the provisions of the latter applied even where the aircraft was not in flight.

Article 1, paragraph 3

8. The Subcommittee noted that certain difficulties could arise in the application of the second sentence of Article 1(3). It could conceivably happen that there might be one civil passenger, one piece of civil cargo or one piece of mail on board a military aircraft, and the carriage of any of these for remuneration or hire would be sufficient to attract the application of the convention to the whole aircraft and to all persons on board, even if none of the latter was a civilian. In view of this problem, the Subcommittee considered it to be necessary that *the Legal Committee reexamine* the questions of the manner and the extent to which the convention would apply to military, customs or police aircraft. In this connection, the Subcommittee was of the opinion that any aircraft, even one owned or operated by a State, should, if used in the carriage of passenger, cargo or mail for remuneration or hire, be covered by the convention at least in so far as civilians on board were concerned.

9. Another aspect of the problem noted by the Subcommittee was that aircraft not owned by the State, but on charter to the State for military, customs or police services, might be considered to be State aircraft under two different hypotheses:

(a) the whole capacity was chartered by military, customs or police services;
(b) only part of the capacity of the aircraft was chartered by military, customs or police services and the balance of the capacity was chartered to private interests.

9.1 The Subcommittee *calls attention* to the necessity of finding a solution for these problems concerning State aircraft.

Article 2

10. After lengthy debate a majority of the Subcommittee decided to *recommend* the deletion of Article 2 of the Munich draft. In reaching this conclusion the Subcommittee considered the following matters.

10.1 The Subcommittee noted that the purpose of Article 2 of the Munich draft was to define the term "offences" for the purpose of the convention. Here two questions arose:

(a) The exact meaning and effect of the term "offences."
(b) The jurisdiction to which offences must be related in order to come under the convention.

(a) The meaning and effect of the term "offences"

11. One opinion voiced in the Subcommittee was that the offences should be listed in classes, such as, offences against the person and offences against property. Another approach would be to exclude the large number of minor offences that might otherwise fall within the convention by restricting Article 2 to offences which were of a serious nature or were extraditable. A further opinion was that

offences subject to the convention should be only those which jeopardize the safety of the aircraft, or of persons or property therein, or which jeopardize good order and discipline on board the aircraft, as in the formula used in Article 5(1) of the Munich draft.

11.1 In regard to another aspect of this question, one opinion was that it should be made clear whether, in the case of Federal States, the penal laws contemplated in that article were those of the Federation or of individual States in the Federation.

(b) The jurisdiction to which offences must be related in order to come under the convention

12. Since Article 2 of the Munich draft provided that the offences subject to the convention were those punishable by the penal laws of a Contracting State competent in accordance with Article 3, the Subcommittee considered the question whether competent jurisdictions under Article 3 of the Munich draft were, on the one hand, merely those of the State of registration of the aircraft and the State in whose airspace the offence was committed, or, on the other hand, any jurisdiction that might be applicable under national law. However, when the Subcommittee had finished its work on Article 3, it became apparent that, if Article 3 was adopted in its new form, Article 2 of the Munich draft would serve no useful purpose. In this regard, it was observed that Article 2 was not needed in order to define anything in Article 3 because the latter article was concerned solely with the question of jurisdiction.

Article 3, paragraph 1 (Introductory Words)

13. The words "Independently of any other applicable jurisdiction" occurring at the beginning of Article 3(1) of the Munich draft raised two difficulties:

(1) There was the question whether they meant that there was a general concurrence of jurisdiction of the State of registration of the aircraft with the penal jurisdiction of other States imposed for any other reason or under any other legal theory (e.g., nationality of the offender, nationality of the victim, etc.).

(2) There was a possibility that they could be construed as importing into the convention any jurisdiction that might be applicable under national law.

13.1 One argument adduced in favour of retaining the words "Independently . . ." was that to delete them might imply nullifying extraterritorial jurisdiction of a State (not being the State of registration of the aircraft) over its nationals or permanent residents.

13.2 However, it was finally decided to *recommend* the deletion of those words. At the same time, the Subcommittee decided to *recommend* that the following text be included in a separate paragraph in Article 3:

> "This article does not set aside any basis for criminal jurisdiction which a State might have incorporated into its national laws."

Article 3, paragraph 1 (Second Part)

14. The expression "competent jurisdiction" used in the remaining part of Article 3(1) raised two questions:

(1) Was it obligatory or optional for a State to enact laws giving it jurisdiction?

(2) Was it obligatory or optional for a State to try offenders and to apply its penal laws to them?

15. The Subcommittee could not agree on an answer to the first question and *calls the attention of the Legal Committee* to the necessity of reaching a decision on this question.

16. In regard to the second question, the Subcommittee *considered* that, while it should be recognized that the State of registration was competent to apply its penal law to offences occurring on board its aircraft outside its territory, that State would be under no obligation to try offenders and apply its penal laws to them.

Article 3, paragraph 2

17. In relation to Article 3(2), the Subcommittee discussed whether or not Article 3 contained a system of priorities. According to one view, the intent of the Munich draft was that there should be absolute concurrence of jurisdiction since a proposal to have a system of priorities had been defeated during the Twelfth Session of the Legal Committee at Munich by a vote of 14 to 5. However, another view was that Article 3(2) provided, in the cases enumerated in subparagraphs (a) to (e), for a priority of the State in whose airspace the offence was committed. In addition, it was noted that, as drafted at Munich, Article 3(2) contained a direct prohibition against the exercise of jurisdiction by the State in whose airspace the offence was committed except in the cases mentioned therein.

18. On a practical level, the Subcommittee decided that the question of priority would be governed largely by the extent to which extradition treaties existed. After exhaustive debate, it decided that it would not recommend any system of priority to the Legal Committee but that it would *recommend* revision of Article 3(2) in order to make it clear that this provision dealt solely with the problem of keeping interference with air traffic to a minimum and did not establish any sort of priority.

19. Accordingly, the Subcommittee decided to *recommend* the deletion of the introductory part in Article 3(2) of the Munich draft and the adoption, in its place, of the principle that the State overflown should not oblige the aircraft to land in order to exercise criminal jurisdiction except in the cases enumerated in subparagraphs (a) to (e) of that Article. This action was stated to be without prejudice to the other rights of States under such international instruments as the Chicago Convention and the International Air Services Transit Agreement.

20. The Subcommittee, therefore, *recommends* that the following text be substituted for the introductory part of Article 3(2) of the Munich draft:

> "The State in whose airspace the offence was committed, if such State is not the State of registration of the aircraft, may not compel the aircraft to land in order to exercise its criminal jurisdiction, except in the following cases: . . ."

Article 3, paragraph 3—new paragraph

21. See paragraph 13.2 above.

Article 4

22. The Subcommittee rejected a proposal to delete Article 4, such proposal having been made on the grounds that it was unnecessary and that it was difficult to formulate its principle with accuracy. Among the reasons suggested in favour of retaining the article was that it was necessary in view of the system of concurrent jurisdiction found in the Munich draft convention.

22.1 Although the article was retained, the Subcommittee nevertheless decided to *recommend* the following amendments to it:

(1) substitute the words "convicted in" in place of "prosecuted by the authorities of";
(2) add after the words "national of" the words "or permanently resident in";
(3) include in Article 4 the principle that a sentence or any part thereof already served should, in the case of subsequent conviction for the same act, be deducted in all cases, including that of a national.

22.2 A proposal to add to Article 4 the words: "or the offence was against the national security of such State" was defeated by a tie vote.

22.3 In view of the foregoing decisions, the Subcommittee *recommends* the adoption of the following text of Article 4:

> "Where a final judgment has been rendered by the authorities of one Contracting State in respect of a person for an offence, such person shall not be convicted in another Contracting State for the same act, if he was acquitted or if, in the case of a conviction, the sentence was remitted or fully executed, or if the time for the execution of the sentence has expired, unless he is a national of, or permanently resident in, such State and its laws permit such further trial." (*Note*: As indicated above, Article 4 should be completed by the inclusion of the principle concerning deduction for a sentence or any part thereof served abroad.)

Article 5, paragraph 1

23. In view of the decision to include in the introductory part of Article 1(1) the formula taken from the introductory part of Article 5(1) of the Munich draft, the Subcommittee *recommends* the deletion from Article 5(1) of the words "which, whether or not it is an offence, may or do jeopardize the safety of the aircraft, or persons or property thereon, or which jeopardizes good order and discipline on board," and the substitution therefor of the words "contemplated in Article 1, paragraph 1."

23.1 The Subcommittee decided to *recommend* that the expression "measures of restraint" be amended to read "measures including restraint", because the existing expression appeared to specify "restraint" as the only measure which could be taken. It also decided to *recommend* that the word "measures" should be qualified by the term "reasonable."

23.2 The question was raised whether the expression "which seem necessary" should not be changed so as to provide for a subjective test, namely, "which seem to him to be necessary." It was *decided* to *place this proposal before the Legal Committee* without the Subcommittee taking a decision upon it.

23.3 It was agreed to *recommend* that the word "disembark" should be added in clause (c) before the words "the person" in place of the word "deliver"; and also to insert the words "or deliver such person" after the words "restrained." Clause (c), as thus amended, would read as follows:

> "(c) to enable him to disembark the person so restrained or deliver such person to competent authorities."

23.4 In view of the foregoing recommendations, the proposed new text of Article 5(1) would read as follows:

> "1. When the aircraft commander has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an act contemplated in Article 1, paragraph 1, the aircraft commander may impose upon such person reasonable measures including restraint which seem [to him] to be necessary:
>
> (a) to protect the safety of the aircraft, or persons or property therein; or
>
> (b) to maintain good order and discipline on board; or
>
> (c) to enable him to disembark the person so restrained or deliver such person to competent authorities."

Article 5, paragraph 3

24. The Subcommittee agreed to *recommend* to the Legal Committee that, in the first sentence of Article 5(3), the words "when enbarkation on board has been completed and the moment when disembarkation has commenced" should

be replaced by the words "when the person concerned has embarked and the moment when he disembarks." Here, it was noted that acts jeopardizing the safety of the aircraft and its contents could occur even if only a single passenger was on board during the period of embarkation or disembarkation. In such a case, even if the doors of the aircraft were open, measures to preserve safety might be so urgently required that crew members could hardly be expected to wait for the intervention of local police.

24.1 In this regard, the Subcommittee invites attention to the comments made in paragraph 7 above.

25. The Subcommittee, therefore, *recommends* the adoption of the following new text of Article 5(3):

> "(3) Such powers of the aircraft commander, crew members and passengers and the powers conferred by Article 6 may be exercised with respect to an act contemplated in Article 1, paragraph 1, when committed between the moment when the person concerned has embarked and the moment when he disembarks if the flight is one of those described in Article 1, paragraph 1. In the case of a forced landing outside an airport, such powers of the aircraft commander shall continue as to acts committed on board until competent authorities take over the responsibility for the aircraft, persons and property on board."

Article 6, paragraph 1

26. In regard to the first part of this provision, it was pointed out that the aircraft commander might have difficulty in deciding whether or not an act constituted an "offence," let alone a "serious offence." This would be so even if he had to make such determination merely by reference to the law of the flag of the aircraft. The difficulty would be compounded if he had, instead, to refer to the penal laws of a wide variety of States. In particular, it was observed that an act which might be a serious offence under the law of one State, might not even be an offence under the law of another.

26.1 The Subcommittee, therefore, agreed that the convention should establish an objective test, i.e., one which would enable the aircraft commander to disembark a person who jeopardizes safety or good order and discipline. Accordingly, it *recommends* that there be deleted from Article 6(1) the words "has committed a serious offence on board the aircraft, or."

26.2 In order to be consistent with the amendments recommended in the case of Articles 1(1) and 5(1), the Subcommittee *recommends* the deletion from Articles 6(1) of the words "which, whether or not it is an offence, may or does jeopardize the safety of the aircraft, or persons or property therein, or which jeopardizes good order and discipline on board" and the substitution therefor of the words "contemplated in Article 1, paragraph 1".

26.3 Consequently the proposed new text of Article 6(1) reads as follows:

> "1. The aircraft commander may disembark in the territory of any State in which the aircraft lands any person who he has reasonable grounds to believe has committed, or is about to commit, on board the aircraft an act contemplated in Article 1, paragraph 1."

26.4 The next question considered by the Subcommittee was whether the aircraft commander should be empowered to disembark a person in "any" State under the circumstances described in Article 6(1), because this would include non-contracting States. In this regard, it was appreciated that the convention would bind only Contracting States and that it could not impose requirements on a non-contracting State. However, the Subcommittee *was of the opinion* that it would nevertheless be appropriate for the convention to continue to grant the aircraft commander the power of disembarkation under Article 6(1) in any

State since such a provision, coupled with the provision giving him immunity from suit (Article 9), would protect him in circumstances where disembarkation was necessary in the interest of safety and good order and discipline, irrespective of whether or not the State of landing was willing to permit the person disembarked to remain in its territory.

Article 6, paragraph 2

27. In connection with Article 6(2), the Subcommittee considered several problems including the following:

(1) Whether the text of the Munich draft was susceptible of the interpretation that the aircraft commander might hold the person concerned in custody while the aircraft was on the ground in a non-contracting State in order to deliver him to the competent authorities of the next Contracting State in which the aircraft landed.

(2) Whether the aircraft commander might deliver to the competent authorities of a Contracting State *any* person on whom he had imposed restraint by virtue of action taken under Article 5.

(3) Whether Article 6(2) should be confined to the case where the aircraft commander had reason to believe that the person concerned had committed on board an aircraft an act which, in his opinion, was a serious offence under the penal laws of the State of registration.

27.1 Having examined all of the three problems mentioned above, the Subcommittee adopted and *recommends* the following new text of Article 6(2):

> "2. The aircraft commander may deliver to the competent authorities of any Contracting State in the territory of which the aircraft lands any person upon whom he has imposed measures of restraint pursuant to Article 5, if he has reasonable grounds to believe that such person has committed on board the aircraft an act which, in his opinion, is a serious offence according to the penal laws of the State of registration of the aircraft."

27.2 In the case of the first problem, it was recalled that the Legal Committee at Munich had taken a clear decision not to permit the onward carriage of the suspected offender under the circumstances described in item (1) above. (ICAO Legal Committee, Twelfth Session, Vol. I (Minutes), page 187.) That being so, the Subcommittee decided to *recommend* that there be no exception which would permit the onward carriage of the suspected offender to a Contracting State from a non-contracting State in which a landing had been made. However, the Subcommittee *calls the attention* of the Legal Committee to the fact that neither the recommended text, nor the Munich text disposes of the possible interpretation mentioned.

Article 8, paragraph 1

28. One criticism made of Article 8(1) was that it served no useful purpose, since the State of registration of the aircraft could always require, under its national laws, the kind of reports contemplated by that provision.

28.1 It was indicated that if Article 8(1) had any virtue at all, it was that the provision would serve as a defence under Article 9 of the Munich draft if an action was brought against an aircraft commander for having made a report of the kind contemplated by Article 8(1). However, the Subcommittee felt that this was a situation which persons reporting offences commonly had to face outside the convention, and that there was no need to have a specific provision covering this point.

28.2 In view of the foregoing, it was agreed to *recommend* that Article 8(1) be deleted.

Article 8, paragraph 2

29. The Subcommittee did not adopt a proposal to delete Article 8(2). Instead, it decided to *recommend* that, under the circumstances described in Article 8(2), some notification should be given to the competent authorities of the State where the aircraft intended to land, but that the obligation to notify should apply only in relation to a case where a person on board was under restraint by virtue of the provision of Article 5. In reaching this decision, the Subcommittee noted that, quite aside from any obligation that the aircraft commander might have to give notifications under the convention, he could, in any event, of his own volition, notify the competent authorities of any State of any occurrences on board his aircraft.

29.1 The Subcommittee adopted the following text which it *recommends* as a substitute for the provisions of Article 8 of the Munich draft:

> "The aircraft commander shall, before landing in the territory of a State, with a person on board who is under restraint in accordance with the provisions of Article 5, as soon as practicable, notify the competent authorities of the State where he intends to land of the fact that a person on board is under restraint and of the reasons for such restraint."

Article 9

30. The Subcommittee decided to *recommend* the deletion of the word "reasonable" before the words "restraint" and "performance" respectively, and, as previously mentioned in paragraph 23.1 above, to introduce the word "reasonable" before the word "measures" in Article 5(1).

30.1 Doubt was expressed as to whether the words "any proceedings" were sufficient to cover not only civil and criminal proceedings but also, as intended by the Legal Committee at Munich, proceedings of an administrative character such, for example, as any which might lead to revocation of a license of a crew member. The Subcommittee decided that this was a question of drafting which could be considered by the Legal Committee.

Article 10, paragraph 1

31. The Subcommittee decided to call to the attention of the Legal Committee that it appears from the comments of some States that it might be desirable *to make it clear* that the immigration laws of the State in whose territory a person was disembarked would not be affected by this convention;[1] also that any right of the State of disembarkation, under its national law, to require an airline to carry the unwanted passenger away or to pay for his transportation, would not be affected by the convention.

Article 10, paragraph 2

32. The Munich draft does not deal with the question as to what arrangements may be made by the State in whose territory a person is disembarked or delivered by the aircraft commander but the authorities of which State do not wish to detain him. Comments received from certain States indicated the desirability of adding in Article 10 a provision to solve this question. Therefore, the Subcommittee *recommends* that a provision along the following lines should be included as paragraph 4 in Article 10:

> "At the request of the State in whose territory the person is disembarked or delivered, the State of which he is a national, the State of which he is a permanent resident and the State in which he began his journey shall be obliged to admit him into its territory, unless he is a national of, or permanent resident in, the requesting State."

[1] See the Minutes of the Twelfth Session of the Legal Committee, Vol. I, pp. 194-197.

32.1 While accepting the foregoing, some members wished to expand the principle along the following lines:

(a) that in addition to the States mentioned, the State of destination of the passenger disembarked or delivered should also be obliged to accept him; and
(b) that as amongst the foregoing States, there should be an order of priority established in regard to the obligation to admit such person.

32.2 Another question raised in the comments of some States with reference to paragraph 2 of Article 10 was to the effect that, if the State where a person is delivered by the aircraft commander does not have jurisdiction or does not wish to exercise it, it should nevertheless be obliged, by a specific provision in the convention, to arrest such person provisionally, pending the receipt of a request for extradition in accordance with existing treaties. This would be the case only if the elements of an extraditable offence were disclosed. A specific proposal in this connection was that the convention should provide that the delivery of the person concerned by the aircraft commander should be deemed to constitute a request for provisional arrest in order to set in motion the procedures relevant to extradition. In this way the State would be enabled to detain the person concerned provisionally for a short time. These proposals failed to find a majority in the Subcommittee.

32.3 The Subcommittee decided to *recommend* that the word "apparent" in the English text before the word "offence" in paragraph 2 should be deleted and replaced by the word "alleged."

32.4 It appeared to the Subcommittee that the *present drafting* of paragraph 2 of Article 10 was *unclear* in that it probably did not fully bring out the intention of the Munich draft that the State in whose territory a person is delivered by the aircraft commander is under no obligation to take him into custody; that it would take him into custody only if its laws so permitted and further only if the circumstances of the particular case warranted that action; and, lastly, that all its national procedures and laws relevant to safeguarding of human rights, such as the maximum period of detention, the right to have council, the right to be informed of the specific reasons for his arrest and so on, would be applicable to the case.

Article 10, paragraph 3

33. In the opinion of the Subcommittee, the present language of the opening portion of paragraph 3 is inaccurate in speaking of "the State having custody." Actually, it might be that the State has refused to take the individual concerned into custody. Therefore, the Subcommittee *recommends* that the expression "if the State having custody" be replaced by the phrase "if the State to which the person is delivered by the aircraft commander."

33.1 The Subcommittee decided to *recommend* that the word "apparent" occurring before the word "offence" in the English text of Article 10(3) should be deleted and replaced by the word "alleged".

33.2 Accordingly, the Subcommittee *recommends* the adoption of the following text of Article 10(3):

> "If the State to which the person is delivered by the aircraft commander pursuant to Article 6, paragraph 2, has no jurisdiction over the offence or does not wish to exercise such jurisdiction, it shall make a preliminary investigation of the alleged offence and shall report its findings and such statement or other evidence as it may obtain to any State in whose territorial airspace the offence was committed, the State of registration of the aircraft and the State of nationality of the suspected offender."

Proposed Additional Provisions

Extradition

34. The Subcommittee examined a proposal to introduce the following new article into the convention:

> "Nothing in this Convention shall be deemed to create a right to request extradition of any person or an obligation to grant extradition. However, the term "jurisdiction" in any arrangements respecting extradition between States parties to this Convention shall, with respect to an offence to which this Convention applies, be taken to include jurisdiction as specified in Article 3(1) of this Convention."

34.1 The second sentence of the proposal was regarded by some as objectionable, because it would be dangerous to try to modify, by a multilateral treaty, existing bilateral treaties concerning extradition. The exact terms and language of each one of the latter treaties, of which there might be several hundred, would have to be examined and interpreted, before the proposed second sentence of the new article could be accepted and this was impracticable. However it was agreed that it was necessary to consider the problem dealt with by the second sentence.

34.2 In view of the foregoing, the Subcommittee

(1) *recommends* that the draft convention include an article reading as follows:
"Nothing in this Convention shall be deemed to create a right to request extradition of any person or an obligation to grant extradition."; and

(2) *calls the attention of the Legal Committee* to the problem raised by the second sentence.

"Hijacking" (Unlawful Seizure of Aircraft)

35. A United States proposal (LC/SC "Legal Status 1962" No. 5) was placed before the Subcommittee. In this connection the Subcommittee discussed the problem of the carriage of arms on aircraft.

35.1 There was general agreement that the United States proposal was important. It was noted that this proposal would introduce a description of a particular crime into the draft convention which up till now did not refer specifically to any particular offence.

35.2 The Members of the Subcommittee pointed out that they had not had an opportunity of consulting the authorities in their respective States in regard to the United States proposal because they had received the proposal at a late date. Thus, there had been very little time to consider the important issues arising from the proposal. The Subcommittee considered that the proposal should be examined by the Governments of the Contracting States, so that the Legal Committee, when it met in Rome, on 28 August 1962, would have the views of the Governments before it. It was also the general opinion that, while the proposal could be the subject matter of a separate international agreement, nevertheless it raised questions closely related to the Munich draft convention. Accordingly, the Subcommittee decided to *recommend* to the Legal Committee to consider the United States proposal in connection with the Munich draft convention.

Chartered Aircraft

36. The Subcommittee considered a suggestion that the convention should include the following provision concerning chartered aircraft:

> "An aircraft chartered without a crew to an operator who is a national of a State other than the State of registration of the air-

craft shall, for the purpose of this Convention, be treated as if, for the period of charter, it was registered in the State of which the charterer is a national."

36.1 The Subcommittee was given the example of an offence being committed on board an aircraft leased by the operator of the State of registration to an operator located in a State far removed from the State of registration. Such offence might be committed over the high seas on the other side of the world by a person who did not have the remotest connection with the State of registration of the aircraft. Under these circumstances it would be impracticable to insist that the offender should be taken to the State of registration for trial.

36.2 Some uneasiness was expressed in regard to the proposed text, since the nationality of the operator was not necessarily a good basis for constructive registration of a chartered aircraft. For example, the operator might be a person or entity of dual nationality or even a Stateless person.

36.3 The Subcommittee decided to report to the Legal Committee that the problems dealt with by the above-mentioned proposal is an important matter which *requires solution,* but that the foregoing proposal had some defects. In any event, the Subcommittee *noted* that the Council had referred Resolution B of the Guadalajara Conference to the Fourteenth Session of the Assembly, and that this Resolution dealt with a very closely related problem. Consequently, the Subcommittee was *of the opinion* that whatever work was carried out by the Legal Committee on the question of chartered aircraft in relation to the draft convention on offences and other acts occurring on board aircraft should be consistent with the work which ICAO might carry out with respect to Resolution B of the Guadalajara Conference.

37. In the course of making this report on the comments received from States and international organizations on the Munich draft convention, the Subcommittee has made recommendations for redrafting some of the articles of the Munich draft. For convenience, the recommended redraft of each article of the draft convention is set out in the Appendix hereto, which contains also, for comparison, the Munich text of all the articles.

APPENDIX

Text of the Munich draft convention	Text of redraft proposed by the Subcommittee (Montreal, March-April 1962)
Article 1	**Article 1**
1. This Convention shall apply in respect of the offences and other acts hereinafter mentioned when committed or done by a person on board any civil aircraft registered in a Contracting State, while that aircraft is:	1. This Convention shall apply in respect of offences and of acts which, whether or not they are an offence, may or do jeopardize the safety of the aircraft or persons or property therein or which jeopardize good order and discipline on board when committed or done by a person on board any aircraft registered in a Contracting State, while that aircraft is: (see para. 4 of the Report)
(a) in flight in the airspace of a State other than the State of registration; or	(a) No change
(b) in flight between two points of which at least one is outside the State of registration; or	(b) No change
(c) in flight in the airspace of the State of registration if a subsequent landing is made in another Contracting State with the said person still on board; or	(c) in flight between two points in the territory of the State of registration if a subsequent landing is made in another Contracting State with the said person still on board; or (see para. 6 of the Report)
(d) on the surface of the high seas or of any other area outside the territory of any State.	(d) No change
2. For the purposes of this Convention an aircraft is considered to be in flight from the moment when power is applied for the purpose of actual take-off until the moment when the landing run ends.	2. No change
3. This Convention shall not apply to State aircraft. Aircraft used in military, customs and police services shall be deemed to be State aircraft; however, any aircraft engaged in the carriage of passengers, cargo or mail for remuneration or hire shall be subject to this Convention.	3. No change (But see paras. 8 and 9.1 of the Report)

Article 2

Offences, for the purposes of this Convention, are offences punishable by the penal laws of a Contracting State competent in accordance with Article 3.

Article 3

1. Independently of any other applicable jurisdiction, the State of registration of the aircraft is competent to exercise jurisdiction over offences committed on board the aircraft.

2. The criminal jurisdiction of a State in whose airspace the offence was committed, if such State is not the State of registration of the aircraft or the State where the aircraft lands, shall not be exercised in connection with any offence committed on an aircraft in flight, except in the following cases:

(a) if the offence has effect on the territory of such State;

(b) if the offence has been committed by or against a national of such State;

(c) if the offence is against the national security of such State;

(d) if the offence consists of a breach of any rules and regulations relating to the flight and manoeuvre of aircraft in force in such State;

(e) if the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under an international agreement.

Article 2

Deleted (see paras. 10-12 of the Report)

Article 3

1. The State of registration of the aircraft is competent to exercise jurisdiction over offences committed on board the aircraft. (see para 13.2 of the Report)

2. The State in whose airspace the offence was committed, if such State is not the State of registration of the aircraft, may not compel the aircraft to land in order to exercise its criminal jurisdiction, except in the following cases: (see para. 20 of the Report)

(a) No change

(b) No change

(c) No change

(d) No change

(e) No change

3. This article does not set aside any basis for criminal jurisdiction which a State might have incorporated into its national laws. (see para. 13.2 of the Report)

Article 4

Where a final judgment has been rendered by the authorities of one Contracting State in respect of a person for an offence, such person shall not be prosecuted by the authorities of another Contracting State for the same act, if he was acquitted or if, in the case of a conviction, the sentence was remitted or fully executed, or if the time for the execution of the sentence has expired, unless he is a national of such State and its laws permit such further trial.

Article 4

Where a final judgment has been rendered by the authorities of one Contracting State in respect of a person for an offence, such person shall not be convicted in another Contracting State for the same act, if he was acquitted or if, in the case of a conviction, the sentence was remitted or fully executed, or if the time for the execution of the sentence has expired, unless he is a national of, or permanently resident in, such State and its laws permit such further trial.

(*Note*: As indicated in paragraph 22.1 of the report, Article 4 should be completed by the inclusion of the principle concerning deduction for a sentence or any part thereof served abroad.) (see para. 22.3 of the Report)

Article 5

1. When the aircraft commander has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an act which, whether or not it is an offence, may or does jeopardize the safety of the aircraft, or persons or property therein, or which jeopardizes good order and discipline on board, the aircraft commander may impose upon such person measures of restraint which seem necessary:

(a) to protect the safety of the aircraft; or persons or property therein; or

(b) to maintain good order and discipline on board; or

(c) to enable him to deliver the person so restrained to competent authorities.

Article 5

1. When the aircraft commander has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an act contemplated in Article 1, paragraph 1, the aircraft commander may impose upon such person reasonable measures including restraint which seem [to him] to be necessary: (see para. 23.4 of the Report)

(a) No change

(b) No change

(c) to enable him to disembark the person so restrained or deliver such person to competent authorities. (see para. 23.4 of the Report)

2. The aircraft commander may require or authorize the assistance of other crew members and may request or authorize, but not require, the assistance of passengers to restrain any person whom he is entitled to restrain. Any crew member or passenger may also take reasonable preventive measures without such authorization when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or persons or property therein.

2. No change

3. Such powers of the aircraft commander, crew members and passengers and the powers conferred by Article 6 may be exercised with respect to acts, whether offences or not, of the kind described in paragraph 1 of this Article when committed between the moment when embarkation on board has been completed and the moment when disembarkation has commenced if the flight is one of those described in Article 1, paragraph 1. In the case of a forced landing outside an airport, such powers of the aircraft commander shall continue as to acts committed on board until competent authorities take over the responsibility for the aircraft, persons and property on board.

3. Such powers of the aircraft commander, crew members and passengers and the powers conferred by Article 6 may be exercised with respect to an act contemplated in Article 1, paragraph 1, when committed between the moment when the person concerned has embarked and the moment when he disembarks if the flight is one of those described in Article 1, paragraph 1. In the case of a forced landing outside an airport, such powers of the aircraft commander shall continue as to acts committed on board until competent authorities take over the responsibility for the aircraft, persons and property on board. (see para. 25 of the Report)

4. For the purposes of this Convention, the aircraft commander is the individual on board an aircraft who is responsible for the operation and safety of that aircraft.

4. No change

Article 6

1. The aircraft commander may disembark in the territory of any State in which the aircraft lands any person who he has reasonable grounds to believe has committed a serious offence on board the aircraft, or has committed, or is about to commit, on board the aircraft an act which, whether or not it is an offence, may or does jeopardize the safety of the aircraft, or persons or property therein, or which jeopardizes good order and discipline on board.

Article 6

1. The aircraft commander may disembark in the territory of any State in which the aircraft lands any person who he has reasonable grounds to believe has committed, or is about to commit, on board the aircraft an act contemplated in Article 1, paragraph 1. (see para. 26.3 of the Report)

2. The aircraft commander may deliver to the competent authorities of any Contracting State in the territory of which the aircraft lands any person who he has reasonable grounds to believe has committed a serious offence on board the aircraft.	2. The aircraft commander may deliver to the competent authorities of any Contracting State in the territory of which the aircraft lands any person upon whom he has imposed measures of restraint pursuant to Article 5, if he has reasonable grounds to believe that such person has committed on board the aircraft an act which, in his opinion, is a serious offence according to the penal laws of the State of registration of the aircraft. (see para. 27.1 of the Report)
Article 7	**Article 7**
The aircraft commander shall transmit to the authorities to whom any suspected offender is delivered pursuant to the provisions of Article 6, paragraph 2, relevant evidence and information which, in accordance with the law of the State of registration of the aircraft, are lawfully in his possession.	No change
Article 8	**Article 8**
1. The aircraft commander shall report to the competent authorities of the State of registration of the aircraft the fact that an apparent offence has occurred on board, any restraint of any person, and any other action taken pursuant to this Convention, in such manner as the State of registration may require.	1. Deleted (see para. 28.2 of the Report)
2. The aircraft commander shall, as soon as practicable, notify the competent authorities of any Contracting State in which the aircraft lands of the fact that an apparent offence or an act endangering the safety of the aircraft or persons or property therein has occurred and that the suspected person is on board.	The aircraft commander shall, before landing in the territory of a State with a person on board who is under restraint in accordance with the provisions of Article 5, as soon as practicable, notify the competent authorities of the State where he intends to land of the fact that a person on board is under restraint and of the reasons for such restraint. (see para. 29.1 of the Report)

Article 9	**Article 9**
Neither the aircraft commander, other member of the crew, a passenger, the owner or operator of the aircraft nor the person on whose behalf the flight was performed, shall be liable in any proceedings brought in respect either of any reasonable restraint imposed under the circumstances stated in Article 5 or of the reasonable performance of other action authorized by Articles 6, 7 and 8.	Neither the aircraft commander, other member of the crew, a passenger, the owner or operator of the aircraft nor the person on whose behalf the flight was performed, shall be liable in any proceedings brought in respect either of any restraint imposed under the circumstances stated in Article 5 or of the performance of other action authorized by Articles 6, 7 and 8. (see para. 30 of the Report)
Article 10	**Article 10**
1. Any Contracting State shall allow the commander of an aircraft registered in another Contracting State to disembark any person pursuant to Article 6, paragraph 1.	1. No change
2. Any Contracting State shall take custody of any person whom the aircraft commander delivers pursuant to Article 6, paragraph 2, upon being satisfied that the circumstances warrant taking such person into custody and the Contracting State assumes such obligation pursuant to its regulations and laws. If the circumstances involve an offence the State having custody shall promptly notify any State in whose territorial airspace the offence was committed, the State of registration of the aircraft and the State of nationality of the suspected offender of the nature of the apparent offence and the fact that the suspected offender is in custody.	2. No change except that in the English text the word "apparent" before "offence" is to be changed to "alleged". (see para. 32.3 of the Report)
3. If the State having custody has no jurisdiction over the offence or does not wish to exercise such jurisdiction, it shall make a preliminary investigation of the apparent offence and shall report its findings and such statements or other evidence as it may obtain to any State in whose territorial airspace the offence was committed, the State of registration of the aircraft and the State of nationality of the suspected offender.	3. If the State to which the person is delivered by the aircraft commander pursuant to Article 6, paragraph 2, has no jurisdiction over the offence or does not wish to exercise such jurisdiction, it shall make a preliminary investigation of the alleged offence and shall report its findings and such statements or other evidence as it may obtain to any State in whose territorial airspace the offence was committed, the State of registration of the aircraft and the State of nationality of the suspected offender. (see para. 33.2 of the Report)

	4. At the request of the State in whose territory the person is disembarked or delivered, the State of which he is a national, the State of which he is a permanent resident and the State in which he began his journey shall be obligated to admit him into its territory, unless he is a national of, or permanent resident in, the requesting State. (see para. 32 of the Report)
Article 11	**Article 11**
In taking any measures for investigation or arrest or otherwise exercising jurisdiction in connection with any offence committed on board an aircraft the Contracting States shall pay due regard to the safety and other interests of air navigation and shall so act as to avoid unnecessary delay of the aircraft, passengers, crew or cargo.	No change
Extradition	**Extradition**
No provision concerning extradition appears in the Munich draft.	Nothing in this Convention shall be deemed to create a right to request extradition of any person or an obligation to grant extradition. (see para. 34.2 of the Report)

REPORT OF THE LEGAL COMMITTEE RAPPORTEUR ON INTERNATIONAL CONVENTIONS CONCERNING LIABILITY IN RESPECT OF NUCLEAR MATERIALS

1. At its Munich meeting, the Legal Committee appointed a rapporteur to report on international conventions concerning liability in respect of nuclear materials, in the course of preparation by the Organization for European Economic Cooperation (O.E.E.C.) and the International Atomic Energy Agency (I.A.E.A.). The O.E.E.C. (now replaced by O.E.C.D.) is an organization consisting of seventeen European States, but the United States and Canada have a certain interest as associated States. The I.A.E.A. is associated with the United Nations.

2. On July 29th, 1960, the O.E.E.C. Convention was signed at Paris. It has been ratified by Spain and Turkey. Though primarily of regional interest because of its geographical application, it is also of wider interest because it deals with problems which may arise in any part of the world. Your rapporteur may therefore be forgiven for examining it in some detail, insofar as it affects civil aviation. To do so may assist in examining the drafts prepared under the auspices of the I.A.E.A. [See 27 J. Air L. & Com. 170-80 (1960) ed.]

3. The Paris Convention is based on the premise that damage caused by a nuclear incident may be of catastrophic proportions. It is accepted, from inquiries made, that there is a limit to the amount of insurance cover which is available for that kind of damage, and that nuclear insurance will not in practice be available to the general public, as the available cover will be exhausted by insurance taken out by the operators of nuclear installations. Accordingly, the Paris Convention adopts two general principles:

(i) All liability for nuclear damage is channelled to the operator of the nuclear installation, that is to say, the operator of the installation is made liable without proof of fault, and every other person is exonerated from liability, even though at fault. (Articles 3 and 6).

(ii) A limit is placed upon the liability of the operator of the nuclear installation, who is required to carry insurance or make other provision for meeting his liability up to that limit. (Article 7).

4. The first of these principles is possibly novel in jurisprudence. In relieving negligent persons of liability, it recognizes that the prospect of incurring civil liability is not always an essential incentive to taking care; the consequences of negligence may be so serious as to amount to an incentive in themselves, and penal provisions may further discourage negligent conduct. The principle also recognizes that it is likely to be fruitless to impose civil liability on the negligent person if he is in practice unable to provide financial cover to meet so large a potential obligation. In consequence, the Convention applies the theory of *risque* to the operator of the nuclear installation, without whose activities there would be no danger of a nuclear incident. It not only saddles him with liability, whether or not he is at fault, but requires him to carry insurance or make other financial provision (e.g. obtain a government guarantee) so as to ensure that he can meet his obligations. Because it is impossible to obtain insurance up to an unlimited amount, the liability of the operator of the nuclear installation, and with it the duty to carry insurance, are limited to 15,000,000 European Monetary Agreement units of account (corresponding to the United States dollar), or such greater or lesser amount as may be established by the law of the Contracting State in which the nuclear installation is situated, having regard to the operator's possibilities of obtaining insurance or other security; but the lowest limit which may be established is the equivalent of U.S. $5,000,000.

5. Your rapporteur does not propose to restate the many detailed provisions of the Convention, but only to examine those points which appear to be of special interest from the viewpoint of civil aviation. These concern—

(a) the carriage of nuclear substances by air; and
(b) the collision of aircraft with nuclear installations, or with ships, vehicles or aircraft carrying nuclear substances.

The Convention does not deal with the possible development of nuclear-propelled aircraft.

6. The Convention applies to damage to or loss of life of any person, as well as damage or loss of any property, caused by a nuclear incident involving nuclear fuel or radioactive products or waste in, or nuclear substances coming from, a nuclear installation. (Articles 3 and 4). An effect of these provisions, when interpreted with the aid of a somewhat complicated system of definitions (Article 1) is to exclude from the provisions of the Convention radioisotopes outside a nuclear installation which are used or intended to be used for any industrial, commercial, agricultural, medical or scientific purpose. Your rapporteur understands that isotopes of this nature are the principal nuclear substances likely to be carried by air, and that an accident to them is not likely to produce the catastrophic consequences at which the Convention is directed. Radioactive waste, which may involve catastrophic consequences, is in practice excluded from carriage by air because of the great weight of the required shielding, and because of the lack of an economic need for its speedy arrival at its destination. Accordingly, the interest of the Convention for aircraft operators as carriers of nuclear substances is somewhat limited, though it is not excluded.

7. Your rapporteur understands that it is by no means impossible for the collision of an aircraft with a nuclear installation, or with a ship or vehicle carrying nuclear substances, to give rise to damage on a large scale, particularly in case of a fire which disseminates radioactive particles. It is for this reason that the laws of some States regulate the height below which an aircraft may not fly above or near a nuclear installation.

8. The effect of Articles 4 and 6 of the Convention will be to exonerate the operator of the Aircraft from all liability for damage caused by a nuclear incident, and to channel liability solely to the operator of the nuclear installation involved, which, in the case of carriage of nuclear substances by air, will be either the nuclear installation from which they come, or the nuclear installation to which they are consigned. An exception is, however, allowed by Article 4(e) which permits the legislation of Contracting States to substitute the carrier for the nuclear operator as the person solely liable. This, however, may only be done with the carrier's consent. The exception was inserted to meet what was thought to be the not unlikely possibility of the emergence of road carriers who would specialize in the carriage and insurance of nuclear substances. It might conceivably result in carriers by air being subject to pressure to make similar arrangements, but this does not seem to be likely in practice.

9. Article 4 of the Convention includes provisions for determining its application when the carriage is between a nuclear installation in the territory of a Contracting State and a point outside that territory, and in such a case liability is channelled to the operator of the installation in the Contracting State. Under Article 4 the point at which transition to or from the regime of the Convention takes place is the point of loading or unloading in the territory of the non-Contracting State upon the means of transport by which the nuclear substances have been, or are to be, carried to or from that territory. The Convention presumably cannot affect the law of the non-Contracting State, unless as part of the proper law of the contract of carriage. Furthermore, under Article 2 the Convention does not apply to nuclear incidents occurring in the territory of a non-Contracting State or to damage suffered there, unless otherwise provided by national legislation (presumably of the Contracting State whose courts are seized of the case: see Article 14(b)). Article 2 therefore neutralizes to a great degree the application of the Convention to nuclear substances awaiting unloading, or

which have been loaded, in the territory of a non-Contracting State. These provisions seem difficult to follow.

10. The effect of channelling liability to the operator of the nuclear installation, and so relieving the carrier of all liability, may be welcome to aircraft operators, but it will be contrary to the provisions of the Warsaw Convention where that Convention applies, if indeed nuclear substances are ever carried in the same aircraft as passengers and other cargo. Similarly, the exoneration of the aircraft operator may be contrary to the Rome Convention if surface damage is caused either by a nuclear cargo or by collision with a nuclear installation or with an aircraft, ship or vehicle carrying nuclear substances. Accordingly, Article 6(b) of the Paris Convention provides that the exoneration conferred by that Convention is not to affect the application of any international agreement in the field of transport in force or open for signature, ratification or accession at the date of the signature of the Paris Convention. The neat device is adopted of giving the person liable under those Conventions a right of recourse against the operator of the nuclear installation (Article 6(c)), thereby preventing conflict with existing Conventions, while at the same time in effect channelling the liability back to the nuclear operator. His liability will, however, be subject to limitation, and the aircraft operator will not necessarily recover in full the amount he has been obliged to pay under existing Conventions. The Guadalajara Convention, signed in September, 1961, is not an existing convention for this purpose, though it may be possible to argue that any liability arising under that Convention is in truth liability arising under the Warsaw Convention in its amended form, or as amended at the Hague. There might be some difficulty in deciding whether, in the peculiar circumstances in which the Guadalajara Convention applies, the air carrier enjoys the right of recourse given by Article 6(c) of the Paris text against the operator of the nuclear installation.

11. It is of importance to aircraft operators that the Paris Convention grants them exoneration from liability for nuclear damage even though they or their servants or agents have been guilty of negligence, the operator of the nuclear installation being given no right of recourse against other persons except in the limited circumstances of Article 6(f). These are as follows:

> "(i) if the damage caused by a nuclear incident results from an act or omission done with intent to cause damage against the individual acting or omitting to act with such intent;
> (ii) if and to the extent that it is so provided expressly by contract;
> (iii) if and to the extent that he is liable pursuant to Article 7(e) for an amount over and above that established with respect to him pursuant to Article 7(b), in respect of a nuclear incident occurring in the course of transit of nuclear substances carried out without his consent, against the carrier of the nuclear substances, except where such transit is for the purpose of saving or attempting to save life or property or is caused by circumstances beyond the control of such carrier."

Sub-paragraph (iii) relates to an increase of the limits of liability by virtue of Article 7(e), which allows a State to subject the transit of nuclear substances through its territory to an increased limit of its own choosing. In such a case the operator of the nuclear installation may recover from the carrier the amount of any additional liability which the nuclear operator has incurred by reason of the nuclear substances being carried, without his consent, into the territory of a State imposing higher liability. However, Article 7(e) does not apply to carriage by air where, by agreement or under international law, there is a right to fly over or land in the territory of the State concerned. This virtually eliminates

the risk of an aircraft operator being saddled with any part of the liability for a nuclear incident under Article 7(e), though an error in navigation might in certain circumstances produce that result.

12. Attention is particularly drawn to Article 3(b)(ii) and Article 7, which respectively exclude from the strict liability of the nuclear operator damage occurring to the carrying means of transport, and permit that liability to be restored by national legislation so long as the nuclear operator's liability in respect of other damage is not reduced below $5,000,000. This extraordinary provision evidently arises from a fear that damage to a particularly expensive means of transport (whether an aircraft or a ship) might absorb the whole or greater part of the limitation sum, to the detriment of other claimants.

13. Also worthy of note is the benefit which the drafters of the Paris Convention may have inadvertently conferred upon aircraft operators by defining nuclear incident in such a way as to include any occurrence, or succession of occurrences having the same origin, which causes damage, any of which arises out of radioactive properties. If, therefore, the collision of an aircraft with a nuclear installation causes any radioactivity damage, however small, the operator of the nuclear installation will apparently be liable under Article 3 (up to the applicable limits) not only for the radioactivity damage but also for the impact damage caused by the collision to the aircraft, its passengers and cargo; and the operator of the aircraft will be exonerated by Article 6(b) notwithstanding his own negligence or that of his servants or agents. Whenever, however, the Warsaw Convention or the Rome Convention applied in the circumstances, the operator of the aircraft would be primarily liable, but would enjoy a right of recourse against the operator of the nuclear installation. So far as your rapporteur is aware, these benefits were not sought by aircraft operators, and indeed he understands that, with the exception of Sweden, the Governments of the States signatory to the Convention have subsequently declared that it is not their intention to interpret Article 3 in this generous manner. The effect of those declarations may depend upon national law.

14. Article 4(d) of the Convention requires the operator of the nuclear installation to provide the carrier of nuclear substances with a certificate (known as a "green card") stating the name and address of the nuclear operator, and the amount, type and duration of the insurance or other financial security covering the shipment. The certificate must be issued by the insurer or other financial guarantor, and these statements cannot be disputed by him. The certificate is likely to be of value to carriers, as assuring them that the shipment is in fact covered by the required security.

15. Certain reservations made to the Paris Convention are of interest in relation to civil aviation:

(1) The German Federal Republic, Austria and Greece reserved the right to impose liability on persons additional to the operator of the nuclear installation but only if those persons are fully covered by security obtained by the nuclear operator. This reservation, therefore, allows the aircraft operator to be made liable, but the nuclear operator must provide him with insurance or similar cover. Nevertheless, the aircraft operator might suffer detriment if his aircraft were seized in order to enforce his primary liability. This reservation evidently flows from a constitutional or philosophical objection to channelling liability to the operator of the nuclear installation if, for example, the damage has been caused by the negligence of some other person.

(2) Austria, Greece, Norway and Sweden reserved the right to treat as existing international agreements their existing national legislation which includes provisions equivalent to those of international agree-

ments. This would avoid conflict between the Paris Convention and, for example, national legislation applying the principles of the Warsaw or Rome Conventions, even though those Conventions did not in fact apply.

16. It will be evident from this analysis of those parts of the Paris Convention which most closely concern civil aviation that it is a complicated and rather difficult document which applies new principles to a new situation; but that it can only be welcomed by aircraft operators as relieving them of all, or virtually all, liability for damage caused by nuclear incidents. At the same time, the passenger and shipper of cargo, and the person suffering surface damage, will be entitled to recover compensation from the aircraft operator when an existing convention applies (or, under Reservation (2), is to be treated as applying) and in other cases to recover directly from the nuclear operator so long as the limit placed upon his liability is not exceeded. The risk of that limit being exceeded is counterbalanced by the requirement that insurance cover or other security be obtained by the nuclear operator, thereby ensuring that the compensation is actually paid. A Convention supplementary to the Paris Convention is now under consideration at Brussels under the sponsorship of the Six with a view to increasing the limits of liability and providing for governmental and inter-governmental guarantees.

17. A draft International Convention on Minimum International Standards Regarding Civil Liability for Nuclear Damage has also been prepared by the International Atomic Energy Agency, which is associated with the United Nations, and has its seat at Vienna. At the time of writing it is expected that a diplomatic conference will meet early in 1963 in order to adopt this draft.

18. The Vienna draft follows the main principles of the Paris text, with some welcome simplifications of drafting and arrangement. However, some of the simplification is achieved by the sacrifice of principles vital to civil aviation. In particular, in channelling liability to the operator of the nuclear installation, the Vienna draft makes no saving for existing Conventions, with the consequence that both the Warsaw and Rome Conventions will be partially overruled. States which are parties to those Conventions may have difficulty in accepting conflicting obligations, and may take the view that it is undesirable for existing air law Conventions to be amended piecemeal by other Conventions, according to the nature of the damage done. Certain States, it is understood, wish to insert a saving for existing Conventions similar to that in the Paris text, while one State proposes to insert an express provision that existing Conventions are *pro tanto* superseded.

19. The danger is rendered more acute by the proposal of certain States to confer upon the nuclear operator the right of recourse against a negligent carrier, thereby breaching the principle of channelling liability solely to the nuclear operator. If such a proposal were carried, the limitation of the carrier's libility under the Warsaw Convention would (in the absence of a saving for existing Conventions) be swept away, as would the limitation of liability under the Rome Convention.

20. It is also proposed to write into the Vienna draft the substance of the reservation made by certain States to Article 6(a) of the Paris Convention, thereby enabling Contracting States to impose liability for nuclear damage upon a person other than the operator of the nuclear installation, on condition that that other person is fully covered in respect of his liability by security obtained by the operator of the nuclear installation. This would render general an exception allowed as a concession to the constitutional or other scruples of three States, and would increase the danger that aircraft operators will be involved in litigation concerning nuclear damage and that their aircraft will be attached.

21. The Vienna draft, unlike the Paris text, does not propose to exclude damage to the carrying aircraft from the purview of the Convention. This

would be an advantage to the carrier, and it is significant that an amendment has been proposed by two States to bring the Vienna draft into line with the Paris text on this point. The Vienna draft also does not include the equivalent of Article 7(e)(ii) of the Paris text, which prohibits a State of transit from imposing a higher limit of liability when there is a right to overfly or land in that State by virtue of agreement or international law. This requirement of additional cover would primarily inconvenience nuclear operators rather than carriers, but carriers might find themselves liable to their shippers for an unauthorized diversion into the territory of a State imposing a higher limit (see Article 6(f)(iii) of the Paris text).

22. The conclusion to be drawn from paragraph 18-21 of this report is that there is danger that the Vienna text may create difficulties for civil aviation by interfering with the operation of the Warsaw and Rome Conventions, and that carriers by air may be subjected to new and unnecessary hazards. Your rapporteur therefore recommends that I.C.A.O. should examine these possibilities, and take steps to ensure that this danger is properly met.

23. The problem of conflict between the Paris and Vienna texts remains to be solved, as States may find it impossible to be bound by obligations which in some circumstances are contradictory. The problem will not arise unless and until the Paris Convention has received sufficient ratifications to come into force. It might be resolved if the Vienna draft were to be brought into line with the Paris text (largely by removal of features objectionable from the viewpoint of civil aviation). Alternatively, the parties to the Paris Convention might make appropriate reservations to the Vienna text, which your rapporteur understands is the course now under consideration.

CURRENT LEGISLATION AND DECISIONS

Constitutional Law—Eminent Domain—Air Easements for Low-Flying Aircraft

Plaintiff, in an action against the County of Allegheny, Pennsylvania, alleged that there had been an appropriation of his property as a result of aircraft taking off from and landing at the county's airport adjacent to his property. Plaintiff's complaint further stated there had been a substantial invasion of the peaceful use and enjoyment of his property by low-flying aircraft using the airport. The County of Allegheny owned and operated the airport in accordance with rules and standards set up under the National Airport Plan.[1] The airport facilities were used solely for air transport and commercial transit purposes. The flight patterns for take-offs and landings, which served as the basis of Plaintiff's complaint, were established in accordance with the rules and regulations of the Civil Aeronautics Administration (CAA). The Board of Viewers, which was appointed in accordance with Pennsylvania procedure,[2] found that the amount of clearance between Plaintiff's chimney and the bottom of the CAA approved glide path was 11.36 feet.[3] *Held*: Under the Fourteenth Amendment to the United States Constitution, the county, which is the promoter, owner and lessor of the airport, clothed with the power of eminent domain, is liable for any appropriation of air easements over the adjacent property.[4] This is true even though commercial aircraft were making the overflights of the property, and even though the airspace in which they were flying had been placed within the public domain as navigable airspace.[5] *Griggs v. County of Allegheny, Pennsylvania*, 369 U. S. 84, (1962) (7-2), *reversing* 402 Pa. 411, 168 A. 2d 123 (1961).

The Supreme Court granted certiorari on Plaintiff's allegation that the Pennsylvania Supreme Court's decision was in conflict with *United States v. Causby*.[6] It was in that 1946 decision that the Supreme Court established the concept of aircraft "taking" property, in the constitutional sense, by low flying. *Causby* involved a conflict between the federal gov-

[1] Under the provisions of the National Airport Act, 60 Stat. 170 (1946), 49 U.S.C. 1101 et seq., a Master Plan was to be submitted by the county to the CAA for approval. Included in the Plan was an agreement between the CAA and the county whereby, in consideration for federal funds to help construct the airport, the county agreed to prohibit use of adjoining land which would create a hazard to the aircraft taking off and landing at the airport. This was to be accomplished through enactment of zoning ordinances or by the acquisition of easements or other interests in lands or airspace.

[2] Pa. Stat. Ann. tit. 15, § 481 (1958).

[3] The full facts as found by the viewers were that the surface of the approach area as used by aircraft of private airlines was 11.36 feet above the plaintiff's residence, that the possible danger due to these low flights, the noise and vibrations which they caused, and the lights pointing at the premises at night had greatly damaged and depreciated the value of the property. The court assumed that such facts, which were undisputed, showed a sufficiently substantial deprivation to constitute a taking. 369 U.S. 84, 87 (1962).

[4] U. S. Const. amend. XIV: "Nor shall any person be deprived of life, liberty, or property . . . without due process of law. . . ."

[5] Section 1301 (24) of the Federal Aviation Act of 1958 provides: "Navigable Airspace means airspace above the minimum altitudes of flight prescribed by regulations issued under this act and shall include airspace needed to insure safety in takeoff and landing of aircraft."

[6] 328 U.S. 256 (1946).

ernment's use of a leased airport (used primarily by heavy Army aircraft) and a landowner whose chicken farm was situated under one of the take-off and landing patterns. The Court of Claims found that the take-offs and landings of the military aircraft had destroyed the use of the property as a commercial chicken farm, and had greatly diminished the value of the land.[7] The Supreme Court held there had been a "taking" in the constitutional sense, of a servitude across the plaintiff's land, which required compensation under the Fifth Amendment.[8] The decision made it clear that the Court would no longer accept the doctrine of *ad coelum*[9] as a basis of recovery; that property rights extend only to a height which the owner of the surface may reasonably require in conjunction with the undisturbed use and enjoyment of the surface; and that the vertical limits of these rights would depend upon the particular circumstances surrounding the property in question. The Court's language in this connection is significant:

> The airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment. *The airspace, apart from the immediate reaches above the land, is part of the public domain. We need not determine at this time what those precise limits are.* Flights over private land are not a taking, unless they are so low and so frequent as to be a direct interference with the enjoyment and use of the land.[10]

This and other language in the case[11] would seem to indicate that even if flights in excess of 500 feet, or 1,000 feet[12] substantially interfered with the use and enjoyment of the surface there would also be a taking even though this area is clearly within the public domain.[13] However, the possible ramifications of such language are beyond the scope of this Note.

The Pennsylvania Supreme Court[14] in deciding against Griggs agreed there had been a taking, but not by the County of Allegheny. The state court based its decision on an interpretation of *Causby* requiring the plaintiff to look to the owners of the aircraft to be compensated for any damages that might be caused by their over-flights of his property. Therefore, the court reasoned, as the county owned no aircraft operating out of the Greater Pittsburg Airport, the county could not be liable for damages; and because the commercial airlines are not clothed with the power of eminent domain, no liability could accrue to them. The Supreme Court in the *Causby* case was not confronted with the necessity of making any distinction between the owners of the aircraft and the operator of the

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[7] 60 F. Supp. 751 (Ct. Cl. 1945).

[8] U. S. Const. amend. V: "Nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[9] "*Cujus est solum ejus est usque ad coelum et ad inferos.*" To whomever the soil belongs, he owns also to the sky and to the depths. Black, Law Dictionary 453 (4th ed. 1957).

[10] 328 U.S. at 266. (Emphasis added.)

[11] "If . . . [the CAA] prescribed 83 feet as the minimum safe altitude, then we would have presented the question of the validity of the regulation." 328 U.S. at 263.

[12] "Except when necessary for take-off and landing, no person shall operate an aircraft below the following altitudes: 1,000 feet over congested areas and 500 feet over other than congested areas." 14 C.F.R. § 60.17.

[13] "A public right of freedom of transit in air commerce through the navigable airspace of the United States." 52 Stat. 980, 49 U.S.C. § 1304. See *supra* note 5.

[14] 402 Pa. 411, 168 A. 2d 123 (1961).

airport since the federal government was both the lessor of the airport and the owner of the aircraft.

Mr. Justice Douglas, who delivered the majority opinion in the instant case, clearly points out that in these circumstances it is the county which takes the air easement. This conclusion is based upon the role of the county, which alone determines airport location, where the runways are needed, and what land and air easements are required for the successful operation of the airport.

Mr. Justice Black in his dissenting opinion agreed with the majority that there had been a taking in the constitutional sense under the *Causby* holding, but thought that it was not the county of Allegheny but the federal government which had been guilty of the taking. The dissent is based upon the fact that Congress has placed the areas needed for take-offs and landings within the public domain.[15] He felt that the actual taking occurred when Congress passed the law declaring the airspace to be within the public domain, not when the airport was opened for business by the county. Because the federal government had already acquired the areas, it was not necessary for the county to reacquire the same airspace. This act, coupled with the comprehensive plans set up by Congress for the administration and regulation of both national and international air commerce,[16] should rightfully place the burden of compensation on the federal government. He also points out that municipalities should not be discouraged from building the airports which have become so important to the national economy. He reasons that it was not Congress' plan in passing these laws to affect the local governments in such a way as to impose large liabilities upon them for following the provisions of the acts.

The majority opinion does not overlook the fact that Congress has placed the areas needed for take-offs and landings in the public domain, but the opinion states:

> [A]s we said in the *Causby* case, the use of land presupposes the use of some of the airspace above it. . . . Otherwise no home could be built, no tree planted, no fence constructed, no chimney erected. An invasion of the 'superadjacent airspace' will often 'affect the use of the surface of the land itself.'"[17]

Thus, it would seem that so far as airport liability for taking flight easements is concerned, the effect of the 1958 Federal Aviation Act is of no moment. Actually, this result could have been anticipated from the language of the *Causby* case. In essence, all the new Act did was correct an oversight in the original Act,[18] which did not include in the public domain those areas needed for take-offs and landings. Prior to the change, aircraft flying below 500 feet or 1,000 feet could technically be considered trespassers as they would be operating outside the public domain. This, of course, was not consistent with the purpose of the Act which guaranteed a free right of travel through the navigable airspace.[19] If the purpose of Congress in changing the Act was to remedy an oversight, the instant

[15] See *supra* note 5.
[16] 14 C.F.R. § 60.18.
[17] 369 U.S. 88, 89. (Citation omitted.)
[18] Civil Aeronautics Act of 1938, 52 Stat. 977 (1938), 49 U.S.C. § 401(24) (1958). See *supra* notes 5 and 12.
[19] See *supra* note 13.

case is correct in theory and consistent with the language of *Causby*. The Court further implies that Congress did not intend to pay all the costs of acquiring air easements over adjoining land when municipalities constructed airports.[20] The Court in effect says that the airspace required around these airports may be in the public domain but that there is no compensable taking until the airport is placed there.

The effect of the decision in the instant case on future cases remains to be seen. However, it would seem from this analysis that the decision will only amount to an extension of the property taking concept announced in the *Causby* decision. It will probably be restricted in the future to cases which are closely analogous to the present facts. The decision does not purport to deal with tort liability. In the absence of adequate tort remedies the owners of aircraft and private airports would be immune from liability for this type of interference. However, because these persons have no power of eminent domain, they do not fall within the scope of the decision in the instant case. If any weight is to be given to Congress' declaring areas needed for take-offs and landings to be in the public domain, it would be to prevent suits against the owners of aircraft for trespass.[21] Congress has established highways through the air just as it has established water highways in navigable streams. Some courts will probably continue to grant, under the proper circumstances, injunctive relief or damages or both under the theory of nuisance. Courts generally base their decisions on whether the alleged interference is reasonable under the circumstances, and whether there is an appreciable, tangible injury resulting in actual, physical discomfort, and not merely in a trifling annoyance or inconvenience. It appears, however, that the courts will strictly construe these requirements against the adjoining landowner.[22]

In conclusion, it should be pointed out that at the time of the *Causby* decision the Federal Tort Claims Act[23] had not been enacted. In order to give the landowner a remedy in that case it was necessary to work out the property taking concept.[24] Until the time of the *Causby* decision the courts attacked the problem of flights over land either on the basis of nuisance or trespass. If the facts were such that the case would fit neither theory, then the injury was without remedy as in *Causby*. The Court in that case enunciated the taking theory; it has, in the instant case, clearly stated against whom the theory applies.

Ludolf R. Kuhnell, III
William W. Rodgers, Jr.

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[20] "We see no difference between its responsibility for the air necessary for operation of the airport and its responsibility for the land on which the runways were built. Nor did the Congress when it designed the legislation for a National Airport Plan. For, as we have already noted, Congress provided for the payment to the owners of airports, whose plans were approved by the administrator, of a *share* of 'the allowable cost of the project,' including the 'costs of acquiring land or interest therein or easements through or other interest in air space'." 369 U.S. at 89.

[21] Mills v. Orcas Power & Light Company, 56 Wash.2d 807, 355 P.2d 781 (1960); Cheskov v. Port of Seattle, 55 Wash.2d 416, 348 P.2d 673 (1960).

[22] Antonik v. Chamberlain 78 N.E.2d 752 (1947); Atkinson v. City of Dallas, 353 S.W.2d 275 (1961) (injunctions refused).

[23] 60 Stat. 428 (1946).

[24] Rhyne, *Airport Legislation and Court Decisions*, 14 J. Air L. & Com. 289 (1947).

Liability for Ground Damage Caused by Aircraft—Trespass—Ultra-Hazardous Activity—Negligence

Plaintiffs sought a summary judgment to recover for both personal injuries and property damage suffered as a result of Defendant's airplane crashing in the vicinity of Plaintiffs' apartment building. The crash occurred following a mid-air collision with another aircraft belonging to the co-defendant Trans World Airlines. Plaintiffs based their motion for summary judgment on a trespass theory of liability alleging that the "invasion" caused by the falling aircraft, without more, was grounds for recovery. *Held*: summary judgment denied. In order to constitute an actionable trespass there must be an intent to do the very act which results in the immediate damage. *Wood v. United Airlines*, 32 Misc.2d 955, 223 N.Y.S.2d 692 (Sup. Ct.) *aff'd* 226 N.Y.S.2d 1022 (1962).

In presenting their case the plaintiffs were unable to show that the invasion was due to a volitional act of the defendant. The court made a distinction between a forced but intentional landing and the situation where, as in the instant case, the plane falls to earth out of control. The plaintiffs relied heavily upon *Margosian v. U. S. Airlines*,[1] a case in which the injured party was granted summary judgment upon the issue of liability in trespass. The court here pointed out that in *Margosian* the pilot was attempting to make a landing at Idlewild airport when the crash occurred. Hence the intrusion in that case was held to be intentional and distinguishable from the facts in the instant case.

If trespass can be shown the courts in almost all jurisdictions will hold those in control of the aircraft strictly liable for harm which they cause.[2] However, those courts are not at all in agreement on the proper theory of liability to apply in the absence of trespass. About one-half of the states have attempted to solve the problem through legislation. Of those states which do have statutes several impose strict liability through laws modeled primarily on Section 5 of the Uniform Aeronautic Act.[3] The Uniform Act was promulgated by the Commission on Uniform State Laws in 1922, but was withdrawn by the Commissioners in 1943. Hence, those states continue to operate under a law which was tacitly disapproved nearly twenty years ago.[4] In other states in which statutes on this point have been enacted the liability imposed varies from absolute liability for forced landings only,[5] to a presumption of negligence,[6] to recovery only upon proof of negligence.[7]

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[1] 127 F. Supp. 464 (E.D.N.Y. 1955).

[2] See, *e.g.*, State ex rel. Brickhead v. Sammon, 189 A. 265 (Md. Ct. App. 1936).

[3] 9 Uniform Law Ann. XVI.

[4] See, *e.g.*, United States v. Praylou, 208 F.2d 291 (4th Cir.) cert. den. 347 U.S. 934 (1954), quoting § 5 and holding for strict liability. "The owner of every aircraft which is operated over land or waters of this State [South Carolina] is absolutely liable for injuries to persons or property on the land beneath caused by ascent, descent or flight of the aircraft or dropping or falling of any object therefrom whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person injured or owner or bailee of the property injured."

[5] Wyo. Stat. Ann. ch. 3, § 10.33 (1957).

[6] Md. Ann. Code Art. 1A, § 9 (1957).

[7] Ariz. Rev. Stat. Ann. ch. 2, § 2.207 (1956).

The jurisdictions which rely upon common law principles are about equally divided between strict liability and ordinary negligence. The states which apply the rule of strict liability follow the attitude found in the Restatement of Torts published in 1938. According to Section 520 of the Restatement, "aviation in its present state of development is ultra-hazardous" and consequently one of those activities for which liability is imposed without fault.[8]

Possibly the strongest argument in favor of strict liability (one which has a great deal of merit even in the face of the tremendous advances in aviation safety) was set forth in *Prentiss v. National Airlines*.[9] In that case the court held the New Jersey statute[10] constitutional as a valid exercise of the state's police power. The court justified strict liability on the grounds of public policy. The purpose of the statute, it reasoned, was to spread the cost of the damages caused by the enterprise over the industry itself, much on the same theory as workmen's compensation laws which apply to all businesses, hazardous and non-hazardous alike. The court saw no reason why civil aviation should escape liability at the expense of the innocent victim on the ground who is injured by an aircraft accident. There was, even in this case, some reference to the ultra-hazardous nature of aviation, but only in justifying the state legislature's right to govern the industry in this respect and to show that the regulation was not an abuse of legislative power. The court further pointed out that the difficulty in proving negligence in airplane crashes often makes inadequate a plaintiff's remedy which must be predicated on a theory of negligence.

The court in the instant case expressed an opinion which seems to be representative of the reasoning applied in the remaining jurisdictions, one which reflects the modern view concerning liability for ground damage caused by aircraft.

> [I]n light of technical progress achieved in the design, construction, operation and maintenance of aircraft, generally, . . . flying should no longer be deemed to be an ultra-hazardous activity, requiring the imposition of absolute liability, for any damage or injury caused in the course thereof.[11]

In two recent California decisions[12] the courts stated that an airplane was not an inherently dangerous instrument when properly handled by a competent pilot. In Connecticut,[13] Colorado,[14] Florida[15] and Texas[16] the courts have held that in its present state of development, aviation is *not* an ultra-hazardous activity and that the owners and operators of aircraft should be required only to exercise ordinary care.

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[8] See, *e.g.*, Hahn v. U. S. Airlines, 127 F. Supp. (E.D.N.Y. 1954); Parcell v. United States, 104 F. Supp. 110 (S.D.W.Va. 1951). In the Hahn case the plaintiff was granted summary judgment on the basis of a trespass, but the court relied heavily upon Restatement, Torts § 165(c). The rationale of this section is closely related to that found in § 520 dealing with ultra-hazardous activity.

[9] 112 F. Supp. 306 (D.N.J. 1953).

[10] N.J. Stat. Ann. 6: 2-7 (1929). This section was adopted from the Uniform Aeronautic Act § 5 (1922).

[11] 223 N.Y.S.2d at 692.

[12] Southern California Edison Co. v. Coleman, 310 P.2d 504 (Cal. Ct. App. 1957); Boyd v. White 276 P.2d 92 (Cal. Ct. App. 1954).

[13] D' Aquilla v. Pryor, 122 F. Supp. 346 (S.D.N.Y. 1954).

[14] Long v. Clinton Aviation Co., 180 F.2d 665 (10th Cir. 1950).

[15] Grain Dealers National Mutual Fire Ins. Co. v. Harrison, 190 F.2d 726 (5th Cir. 1951).

[16] King v. United States, 178 F.2d 320 (5th Cir.) cert. den. 339 U.S. 964 (1950).

The barnstorming days of 1922, when the Uniform Aeronautic Act was promulgated, and 1938, when the Restatement of Torts first commented on flying have long since passed. Statements that aviation is ultra-hazardous are no longer appropriate. The instant case is one of the better recent comments made in this regard. It seems to be an accurate indicator of the current trend in negligence theories.

Robert L. Trimble

BOOK REVIEW

THE LAW OF INTERNATIONAL AIR TRANSPORT

By Bin Cheng, Lecturer in International Law and Air Law, University College, London

In its introductory note on the back of the cover of the impressive volume, the Library of World Affairs states rightly that "This comprehensive treatise fills a long felt gap in the literature of air law."

After a brief review of the historical development and an explanation of the freedoms of the air and reference to the Chicago Convention of 1944, Volume I, Part One deals fully with the legal aspects of the International Civil Aviation Organization (ICAO), including its functions and the rights and duties of Members under the Chicago Convention. Of particular interest is the study relating to international co-operation and facilitation.

Part Two is devoted to a careful distinction between scheduled and non-scheduled international air services with particular reference to the law on non-scheduled international air transport as affected by bilateral air transport agreements and a very full description of the multilateral Paris Agreement of April 30, 1956.

Part Three is entirely devoted to the scheduled international air transport. The distinction drawn between multilateralism and bilateralism is interesting. The reader will be impressed with the careful and painstaking analysis of the rights of the parties to bilateral air transport agreements, and the methods by which such difficult subjects as route fixing, capacity, change of gauge and tariffs are dealt with by the learned author.

Under the sub-heading of "Inter-Airline Co-operation," reference is made to the "International Air Transport Association," (IATA). The information about an attempt of IATA to go beyond rate fixing and to draw up a consolidated world tariff is somewhat vague. Whilst the many bilateral agreements give certain authority to IATA to deal with rates, it is not correct in fact, or in law, to call this activity of the organization "rate fixing." This activity is completely subject to government approval. Nor was the consolidated tariff project really a matter beyond the scope of the IATA authority as determined by the bilateral agreements or by its Articles of Association or its Charter.

In passing it may be useful to mention that the object of the exercise of the airlines who attempted to draw up the consolidated tariff was more a technical consolidation of existing rules rather than creating more substance. The project was an attempt to put into form certain rules, regulations and rates, many of which had already been agreed by the airlines in the form of Traffic Conference Resolutions approved by governments.

On page 249 reference is made briefly to the IATA Conditions of Carriage for Passengers, Baggage and Cargo and to the Contract on the Passenger Ticket and Air Waybill. These subjects have certain impact on international airline co-operation and it is regretted that they did not receive as full treatment as other parts of the bilateral agreements such as disputes, renewals, etc.

The discussion regarding joint ownership and pooling of services, on page 252, is interesting. Although the author is limited by the availability of material regarding pooling in Europe, he attempts to explore the principles of pooling with skill and understanding. The secrecy that surrounds the operation of pools in Europe explains the lack of completeness of this part.

The conclusions on page 492 suggest that Members of ICAO, under the Chicago Convention, are committed to four cardinal principles; the complete and exclusive sovereignty of every State over the airspace above its territory, nationality of aircraft based on registration, uniform conditions governing aircraft engaged in international aerial navigation, and finally international co-operation in securing the maximum standardization of aeronautical laws, procedures, codes and practices. With this the reader will not find it difficult to agree.

Much less clear, however, is the remark that it has become increasingly more difficult to differentiate between scheduled and non-scheduled services and that non-schedules may be more aptly described as a-scheduled rather than non-scheduled. Nor can one fully appreciate the comment that from the point of view of international regulations, the test to distinguish between scheduled and non-scheduled services has become entirely subjective.

The nature of the two services is quite different and their similarities, if any, from the point of view of applicable international regulations are of no consequence. The distinction between Articles 5 and 6 of the Chicago Convention is obvious, with the result that under Article 5 certain operations are granted by the Chicago Convention itself, and under Article 6 no scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State and in accordance with the terms of such permission or authorization.

It is well accepted today that the Contracting States to the Chicago Convention are not ready to limit their national sovereignty. This is best illustrated by the preambles of bi-lateral agreements. The fact that bi-lateral agreements deal with certain aspects of non-scheduled services, is merely incidental to the major objective of the agreement which is to authorize routes and rights for scheduled operations. The pride of the Nation is the scheduled operator, who is kept sometimes on highly competitive routes only for the purpose of demonstrating prestige.

The volume of non-scheduled operations has increased and their importance cannot be denied. These increases in the numbers do not, however, obliterate the difference between scheduled and non-scheduled operation. The legal and economic differences between the two systems of operating are clear and cannot be overlooked.

Whilst there were attempts toward multilateralism during recent years in international air transport, it would be wrong not to acknowledge that the network of bi-lateral agreements is, and will remain for a long time, the basic element in scheduled international civil aviation. It might be desirable to have a multi-lateral agreement governing scheduled international services but the rigidity of the multilateral principles, compared with the flexibility of bi-lateralism, would seem to make the latter the best suited for this stage of development. However, for the future it may

be interesting to consider what an international organization might be able to do were it given authority to deal with routes, capacities and frequencies. Today this may be a moot question, since no State participating in the Chicago Convention is seriously interested in such a venture, but the thought, however, might hold possibilities.

All this is of importance regarding scheduled operations. Non-scheduled services under Article 5, on the other hand, could develop much more freely, as demonstrated by the Paris Convention of 1956, which even with its limited geographic scope, is an interesting example of post-war air law development.

We must thank Mr. Bin Cheng for undertaking the onerous task of cutting the path through the jungle of international bi-lateral and multilateral agreements. Even if not all his conclusions agree with those of the reviewer, the material is now printed in a thorough, systematic, learned fashion which commends his book to the libraries of all those who have an interest in international air law.

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